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# UNCITRAL Draft Convention on Carriage of Goods by Sea, Part 4

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# *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)\**

JOSEPH C. SWEENEY\*\*

Maritime Law should be the child of commerce rather than the father.

## *L. Elimination of Invalid Clauses in Bills of Lading*

In 1974, as in 1924, it was easy to achieve theoretical unanimity with the proposition that invalid clauses in bills of lading were objectionable and created uncertainty because of their tendency to mislead cargo interests, prolong claim negotiations, and encourage unnecessary litigation, however, there was considerable disagreement as to whether or not any sanctions should be included as a penalty for using an invalid clause. The Sixth Working Group Session Report stated that "a majority of the representatives were in favor of including a sanction, but no clear consensus was reached on the form of this sanction."<sup>170</sup> There was support for removal of the unit limitation of liability, but most delegates thought this "excessive."<sup>171</sup> Delegations favoring sanctions were in favor

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\* This is the fourth of five parts of the study of the new draft convention. The first part appeared in 7 J. Mar. L. & Comm. 69-125 (1975), the second part in 7 J. Mar. L. & Comm. 327-350 (1976) and the third part in 7 J. Mar. L. & Comm. 487-503 (1976).

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<sup>170</sup> Report of the Working Group on the Work of its Sixth Session, U.N. Doc. A/CN. 9/88 of 29 March 1974, para. 85 at 33.

<sup>171</sup> Id, para. 86 at 33. The preparatory report for the session prepared by the Secretariat, Third Report of the Secretary General on Responsibility of Ocean Carriers for Cargo; Bills of Lading; Part Four. U.N. Doc. A/CN. 9/WG III/W.P. 12 (Vol. 3) of 30 November, 1973, had proposed this alternative at para. 14,

### *Draft Proposal B (Alternative 1)*

"The carrier shall not be entitled to the benefit of the limitations on liability provided for in article (6) of this Convention if he asserts in a judicial or arbitral proceedings any clause in the (contract of carriage) (bill of lading) which is clearly inconsistent with ( ).

of a provision rendering the carrier liable for "all expenses, loss or damage caused by an invalid clause."<sup>172</sup> There was considerable disapproval of a provision that would permit assessment of legal fees against the party using an invalid clause on the ground that the "costs" of litigation should be determined by national law.<sup>173</sup> However, a large majority of representatives favored a notice provision in the contract of carriage stating that any clause derogating from the Convention would be null and void, but there was little support for a sanction if such a notice clause was omitted from the contract.<sup>174</sup>

The Hague Rules had specifically outlawed the carrier's "benefit of insurance clause", and the United States Supreme Court had found the "both to blame collision clause" to violate public policy.<sup>175</sup> Nevertheless dubious clauses had not disappeared from the bill of lading despite the clear language of the Hague Rules that clauses which lessen the carrier's liability otherwise than as provided in the Convention shall be, ". . . null and void and of no effect. . . ." <sup>176</sup> Of course, one good reason for retention of possibly invalid clauses was that one never knew where the bill of lading dispute would be litigated, and since there was always a chance that it would be sustained, dubious clauses could be retained since there was no sanction for their continued presence in the bill of lading.

The approach of the Secretariat was that the best legislative approach would be to make it crystal-clear that bill of lading clauses inconsistent with the Convention would be invalid where there was a derogation from

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<sup>172</sup> 3 Sec. Gen. Rpt. (fn. 171 *supra*) at paras. 17-18.

*Draft Proposal B (Alternative 2)*

"The carrier shall be liable for all expenses, loss or damage resulting from a clause which is null and void by virtue of [this article].

<sup>173</sup> Report of the Sixth Session ( see fn. 170 *supra*) at para. 87, at 33.

<sup>174</sup> *Id.*, paras. 89-92 at 34.

The elimination of the limitation of liability as a sanction was reported to have caused considerable complications in the Warsaw Convention and has been deleted from the recent Montreal, 1975 revision as to passengers. The text adopted resembles the sanction of the European Road Convention (C.M.R.), Article 7, para. 3.

<sup>175</sup> *U.S. v. Atlantic Mutual Insurance Co.*, 343 U.S. 236 (1952).

<sup>176</sup> H.R. Art. III (8); U.S. COGSA, 46 U.S.C. 1303(8)

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

a mandatory provision.<sup>177</sup> Unfortunately, the Hague Rules provision could not be copied into the new Convention because it referred only to the provisions on liability and did not deal with the question of the validity of the remainder of the bill of lading where invalid or potentially invalid clauses were included.

Poland, however, believed that the Secretariat's Draft Proposal did not contain sufficient room for party autonomy, since the parties might have good reasons for derogating from the Convention, accordingly it would be desirable to distinguish mandatory provisions of the Convention from those which were merely permissive.

The Soviet Union took the position that since all provisions of the Convention would be mandatory it would be unnecessary to have provisions such as Draft Proposal A concerning clauses which deviated from the mandatory provisions. Furthermore, neither alternative sanction was acceptable in this view, nor was there any need for a notice provision on the application of the Convention.

Japan also disapproved any sanction provision as well as a notice provision, but felt the Secretariat's Draft Proposal A could be acceptable.

Norway stressed the complementary nature of the three Secretariat Draft Proposals and endorsed the need for Draft Proposal A, outlawing invalid clauses only to the extent they derogated from the Convention, and endorsed Draft Proposal C regarding notice as a mandatory provision only if a document were to be issued. The extreme sanction of

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<sup>177</sup> *Draft Proposal*

1. Any clause or stipulation in the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention. The nullity of such a clause or stipulation shall not affect the validity of the other provisions of the contract of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier shall be deemed to derogate from the provisions of this Convention.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention provided such increase shall be embodied in the [contract of carriage] [bill of lading issued to the shipper].

*Draft Proposal C*

"1. Every [bill of lading] [contract of carriage] shall contain a statement that: (a) the carriage is subject to the provisions of this Convention, and, (b) that any clause of the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention."

"2. If the [bill of lading] [contract of carriage] does not contain the statement specified in paragraph 1 (a) and (b) the carrier shall not be entitled to the benefit of the limitation of liability provided for in article ( ) of this Convention."

Draft Proposal B (alternative 1) (loss of unit limitation of liability) was disapproved as too extreme.

Only India approved of the loss of unit limitation as a sanction for invalid clauses. The United Kingdom did not approve any sanction nor the notice provision, in view of the universal knowledge of the applicability of the Hague Rules after fifty years. A majority supported the Norwegian view of the complementary nature of the three Draft Proposals, with clear support for Draft Proposals A and C and a toleration of some form of sanction along the lines of Draft Proposal B (alternative 2). This majority consisted of Hungary, Belgium, Nigeria, Australia, Chile, Argentina, the United States and France.

Argentina had been concerned that the introductory language of Draft Proposal A was unnecessarily restrictive in that it applied only to clauses in either the bill of lading or the contract of carriage, and believed the language should be as broad as possible. This view was also held by Singapore which feared that collateral agreements might not be included which would vary the Convention terms if they appeared in other documents such as booking notes or freight agreements. Norway supported these proposals and the United States offered an amendment to the first sentence of Draft Proposal A as follows,

"Any stipulation of a contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage, shall be null and void to the extent it derogates from the provisions of the Convention."

Although there was general agreement to this amendment, Tanzania noted that the Convention was already too complicated even for lawyers, and that these provisions should be made even clearer so that the Convention and its effect on commercial transactions could be understood by commercial men without the use of lawyers.

The United States endorsed the need for Draft Proposal A in view of the experience that bills of lading continued to offer very dubious clauses to shippers,<sup>178</sup> however, the United States doubted that Draft Proposal

<sup>178</sup> For decisions striking down bill of lading clauses as lessening carrier liability prohibited by COGSA 1303 (8) see: *General Foods Corp. v. The Troubador*, 98 F.Supp. 207 (S.D.N.Y. 1951); *Petition of the United States*, 105 F.Supp. 353 (S.D.N.Y. 1952); *Nashiwa v. Matson Navigation Co.*, 116 F.Supp. 897 (D.C. Hawaii 1953); *Spanish American Skin Co. v. The M.S. Ferngulf*, 143 F.Supp. 345 (S.D.N.Y. 1956) aff'd. 242 F.2d 551 (2nd Cir. 1956); *Karobi Lumber Co. v. S.S. Norco*, 249 F.Supp. 324 (S.D.Ala., 1966) aff'd. 397 F.2d 570 (5th Cir. 1967); *Holden v. S.S. Kendall Fish*, 262 F.Supp. 862 (E.D.La., 1966) aff'd. 395 F.2d 910 (5th Cir. 1967); *Horn v. Cia. de Navegacion Fruco S.A.*, 404 F.2d. 422 (5th Cir. 1968) cert. denied 394 U.S. 943 (1969). See generally *U.S. v. Atlantic Mutual Insurance Co.* 343 U.S. 236 (1952), and *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967). See also *Holden v. S.S. Kendal Fish*, 395 F.2d 910 (5th Cir. 1968) in which COGSA 1303(8) is used to invalidate a clause which might have increased rather than lessened carrier liability.

C, the notice provision, could ever be clear enough so that laymen, unassisted by lawyers, could appreciate their rights under it. Furthermore, there might be endless disputes about the shipper's or consignee's knowledge of the applicability of the Convention under Draft Proposal C if nothing were said about the language of the notification; finally, the two sanction proposals were not adequate to the problem in that Proposal B (Alt. 1) left a measure of uncertainty in that it applied the drastic sanction only when the invalid clause was "clearly inconsistent" and Proposal B (Alt. 2) might interfere with public policy against imposing costs on the losing party in litigation, as was the case in the United States. Draft Proposal C was opposed, in summary, as a needless burden on documentation.

France proposed that the language of the notice under Draft Proposal C would always be the language of the contract, whatever that was, and that there could be a sanction for its absence causally connected to damage, as in the C.M.R. Convention. Since Draft Proposal B (Alt. 2) resembled French law, it also could be approved, but with respect to Draft Proposal A, France offered to amend the language with a non-exhaustive list of forbidden clauses, modeled on Article 29 of the recent French statute.<sup>179</sup> This last proposal was disapproved by Norway, Australia, Japan, Belgium, India and the United States, although both the United States and the United Kingdom pointed out that since the benefit of insurance clause had been singled out for mention in the Hague Rules it would have to be mentioned in the new Convention, lest the erroneous conclusion be drawn that the benefit of insurance clause was now approved after fifty years of invalidity.

The UNIDROIT observer also brought up the problems of the mandatory notice provision with sanction in the Warsaw Convention,

<sup>179</sup> French Proposal (A/CN.9/WG. III (VI)/CRP. 24

1. Any clause in a contract of carriage contained in a bill of lading or any other document shall be null and void to the extent that it derogates from the provisions of this Convention. The nullity of such a clause or stipulation shall not affect the validity of the other provisions of the contract of which it forms part.

2. In particular, any clause is null and void if its purpose or effect is:

(a) to relieve the carrier of the liability defined in article [X] either by granting him special exemption clauses which are not in accord with the provisions of the article or by reversing the burden of proof, which rests with the carrier;

(b) to limit the liability of the carrier to a sum or sums lower than the sum or sums prescribed in article [Y];

(c) to free the carrier of his obligation to deliver the goods to the consignee as prescribed in the article;

(d) to assign to the carrier the benefit of insurance on the good.

The United States noted its reservations to this list because of the great difficulty courts had with differentiating "inclusive lists" ("Inclusio unius est exclusio alterius") from "illustrative lists" ("Eiusdem generis").

and noted that the C.M.R. provision had been prepared by UNIDROIT and the Economic Commission for Europe to ensure that the carrier would not be deprived of unit limitation of liability when omission of the mandatory statements had not been connected with the damage sustained. Since the C.M.R. text had proved satisfactory, UNCITRAL need not "reinvent the umbrella" but rather should follow the C.M.R. text.

The Chairman's summary showed a clear majority in favor of Draft Proposal A, with nuances to be elaborated by a Drafting Party, whereas Draft Proposal B (alternative 1) was clearly rejected while only a few states actively opposed Draft Proposal B (alternative 2) and a slight majority seemed to prefer Draft Proposal C.

The Drafting Party recommended the following text which was approved, with amendments by the Working Group.

1. Any stipulation on the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier or any similar clause shall be null and void.
2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.
3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of the Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.
4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present Article, or as a result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided, that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case.

These provisions are now incorporated in Article 23 of the Draft Convention.

### *M. Reconsideration of Deck Cargo and Live Animals*

Reconsideration of these issues took place during the Sixth Session of the Working Group and during the Second Reading.<sup>180</sup> This proved to be a very contentious issue and is certain to provoke further debate at the UNCITRAL Plenary in 1976 and the subsequent Diplomatic Conference. The provisions of the Draft Convention respecting deck cargo are now to be found in Article 9, and the provisions on live animals in Article 5.

The Third Session of the Working Group had revised the definition of "goods" in Article 1(c) of the 1924 Convention so as not to exclude the carriage of cargo on deck from the coverage of the Convention, but there was no consensus on all issues before the Group.

The Working Group considered two proposals left over from 1972:

#### *Pending Proposal A:*

"In respect of cargo which by contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of the Convention."

The exculpatory nature of this provision was apparent and in view of the reframing of the basic rule on liability and the carrier's burden of proof,<sup>181</sup> there was a consensus that such a provision was now unnecessary. France, Hungary and Norway specifically opposed it, and there was no support for it.

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<sup>180</sup> The first discussion of these topics is reported in Part I of this article, 7 J. Mar. L. & Comm. 84-93.

<sup>181</sup> See Part I of this article, 7 J. Mar. L. & Comm. 102-17.

Because of the problem of inadvertent application of COGSA to on deck carriage, carriers in United States foreign trade customarily add a Deck Cargo Clause to the bill of lading, as follows:

Deck cargo (if stated herein to be so carried) and live animals are received and carried solely at Shipper's and Consignee's risk (including accident or mortality of animals), and the Carrier shall not in any event be liable for any loss or damage thereto arising or resulting from any matters mentioned in Section 4, Sub-section 2(a) to (p) inclusive, of the United States Carriage of Goods by Sea Act, or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived, and the burden of proving liability being in all respects upon the Shipper or Consignee. Except as provided above, such shipments shall be deemed goods, and shall be subject to all terms and provisions in this bill of lading relating to goods.

(Selection 8 from C. Powers, *A Practical Guide to Bills of Lading*, 67 (1966).



Pending Proposal B was made up, in the first place, of three propositions for which there had been consensus in 1972:

(a) The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements, and possibly with usage.

(b) Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.

(c) If the bill of lading does not contain the statement referred to in paragraph (b) above, it shall be presumed that the carrier and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement.

These points of agreement are reflected in the first two paragraphs of Pending Proposal B together with a fourth proposition to which there had been some opposition in 1972:

(d) If an agreement with the shipper that cargo shall be carried on deck is not reflected in the bill of lading, then the carrier shall not be entitled to invoke such agreement against a consignee who has acquired the bill of lading in good faith.

These four points were combined into two paragraphs of Pending Proposal B, as follows:

"1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with usage or with statutory requirements.

"2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading in good faith.

Furthermore, the Secretariat draft had taken the fifth proposition (which had evoked the most criticism of carrier states) and worked it into a complex proposal dealing in one paragraph with several sets of practical problems.<sup>182</sup> The fifth proposition was,

(e) If goods are carried on deck in breach of the principles referred to in paragraph (a) above, then the carrier shall be liable for all losses direct and indirect of on-deck stowage.

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<sup>182</sup> See Report of the Secretary General, U.N. Doc. A/CN.9/WG. III/W.P. 14 of 28 November 1973.

The Secretariat's Pending Proposal read as follows:

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods which result solely from the carriage on deck in accordance with the provisions of [-(unit limitation)]. The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck.

There was never any question that deck carriage was permissible under certain circumstances, but the United States was opposed to the generalization of paragraph 3 from the outset, believing that it did not properly treat the question of the shipper whose goods required under-deck carriage and who had sought and obtained the agreement of the carrier to carry such goods under-deck, but nevertheless suffered losses because the goods had been actually carried on deck.<sup>183</sup>

Norway disagreed with the view that unauthorized stowage on deck would be a serious breach of contract, even with an express agreement to the contrary, because the serious nature of contract breach should be determined by the nature of the voyage and the cargo, not by a rule imposing unlimited liability for such a deviation. Unlimited liability of the carrier would be justified only for wilful misconduct, where the carrier deliberately rather than carelessly stowed under-deck cargo on-deck. The risk to cargo from an on-deck voyage in sheltered coastal waters would be smaller than on an ocean voyage and should not justify unlimited liability. Poland, Belgium, U.K., U.S.S.R., Japan and Australia agreed with Norway.

The United States, however, felt that motion of the vessel and danger of jettison were not the only risks of on-deck stowage and that exposure to sun or heat and cold might be the risk sought to be avoided by the shipper who demanded under-deck stowage. The I.U.M.I. observer agreed that such agreements of shipper and carrier must be honored and that serious consequences must result for breach of such agreements. He felt that uniform rules of world-wide application should be applied to this problem, although there should not be many exceptions to the system of limited liability in the Convention. Singapore, Ghana, Tanzania,

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<sup>183</sup> In United States law such serious breach of the contract of carriage is regarded as a deviation which ousts the bill of lading and makes the carrier without benefit of the unit limitation of liability. See *Encyclopedia Britannica v. Hong Kong Producer*, 422 F.2d 7 (2nd Cir. cert. denied 397 U.S. 964 (1970)). See also *Iligan Integrated Steel Co. v. John Weyerhaeuser Co.*, 507 F.2d 68 (2d. Cir. 1974). Deck storage of a container in a specially built container vessel or a "containerized" vessel is not regarded as an unreasonable deviation. See *E. I. DuPont de Nemours Co., Inc. v. SS Mormacvega*, 493 F.2d 97 (2d Cir. 1974).

India, Nigeria, Argentina and Chile agreed with the United States position.<sup>184</sup>

France favored deletion of all three paragraphs, and the treatment of all questions of deck cargo by the general liability rules. In their view, carrier violation of an agreement to stow under-deck would be fraud which would vitiate any limitation of liability.

Norway then noted that there could not be limited liability for wilful misconduct, but that the degree of the breach must always be assessed in the light of all circumstances. The United States noted, in agreement with Norway and India, that there was no suggestion that every carriage of cargo on deck in violation of some trade custom would result in unlimited liability, but that shippers must be entitled to special protection when they have demanded the special protection of under-deck stow (ie: in conventional, non-containerized vessels).

It was not possible to obtain a consensus because at first 9 states favored the U.S. position and 8 states favored Pending Proposal B; however 7 states favored the U.S. Proposal while 10 states favored Pending Proposal B in another version of the same vote. The chairman referred the entire matter to the Drafting Group to attempt to achieve a compromise text. The attempts at compromise did not resolve all disagreements, and the Report reflected the opinions of some delegates that the protection of shippers and consignees in paragraphs 3 and 4 were inadequate,<sup>185</sup> while others continued to believe that paragraphs 2, 3 and 4 should be bracketed as unnecessary.<sup>186</sup>

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<sup>184</sup> *U.S. Proposal respecting Deck Cargo*

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory rules or regulations [or usage].

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck the carrier shall insert in the contract of carriage or bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement included or endorsed on the bill of lading or other similar document of title the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading or other document of title in good faith.

3. Where loss or damage occurs to goods carried on deck contrary to the provision of paragraph 1, the liability of the carrier for loss, damage or expense shall be determined without reference to Article [Part 5 of Secretariat Compilation of Draft Provisions].

\* \* \*

*Additional Article*

2. The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of Article A if loss or damage occurs to goods carried on deck contrary to the provisions of paragraph 1 of Article [Article on Deck Cargo].

<sup>185</sup> Report of the Sixth Session (fn. 170 *supra*) para. 105(e) at 41.

<sup>186</sup> *Id.* para. 105(d) at 41.

During the Drafting Group's work there was a discussion of the various trades, such as lumber, timber, chemicals and some live animal trades such as elephants, where it was established practice to carry on-deck. Australia proposed the phrase "common usage of the particular trade" to describe these situations, however, India, Ghana and France had serious objections to it and eventually the adjective "common" was eliminated.

The following text was eventually approved by the Working Group as a compromise, and is now found in Article 9 of the draft Convention:

*Article 9. Deck cargo*

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired a bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.

As a result of a study requested by the Commission and prepared by the UNIDROIT,<sup>187</sup> three alternative proposals were considered by the Working Group:

The first concentrated on the problems of special risks involved in live animal carriage, and it proposed that a clause be added to Article 3(8) of the Hague Rules:

"However, with respect to the carriage of live animals, all agreements, covenants or clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted in the contract of carriage."

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<sup>187</sup> The Report of UNIDROIT, prepared by M. Hennebicq and presented by him, was summarized in the Report of the Sixth Session (fn 170 supra) paras. 107-09 at 42-43.

The second proposal, while relieving the carrier of special risks inherent in the carriage of live animals, would place the burden on the carrier of proving that the loss or damage was caused by such inherent risks:

"With respect to live animals, the carrier shall be relieved of his responsibility where the loss or damage results from the special risks inherent in the carriage of animals. When the carrier proves that, in the circumstances of the case, the loss or damage could be attributed to such risks, it shall be presumed that the loss or damage was so caused, unless there is conflicting proof that such risks were not the whole or partial cause of it. Furthermore, the carrier shall prove that all steps incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him."

The third proposal brought live animal carriage under the general rules of liability of the Convention, but a paragraph would be added to Article 4(6) of the Hague Rules requiring notice by the shipper to the carrier of the nature of the danger in the carriage of particular animals and the steps that may be taken by the carrier if such animals become a danger. This was the solution preferred by UNIDROIT.

"Before live animals are taken in charge by the carrier, the shipper shall inform the carrier of the exact nature of the danger which they may present and indicate, if need be, the precautions to be taken. If such animals become a danger to the ship and the cargo, they may, at any time before discharge, be landed at any place or rendered harmless or killed, without liability on the part of the carrier except to general average, if any, provided that he prove that he unsuccessfully took all measures that could reasonably be required in the circumstances of the case."

Australia endorsed the third proposal, without the proposed language, noting that it exported about one million live animals per year, yet did not believe special treatment of live animals to be justified. Argentina, Ghana and Tanzania agreed with Australia.

The I.C.S. observer said that live animals were not hazardous cargo because of the truly unique problems that can arise, referring to the case of the herbivorous rhinoceros which chewed off the arm of a crew member. Specifically he noted that there would be no way to establish cause of death when an animal died at sea, and attendants usually blamed the carrier in order to exculpate themselves.

The United Kingdom urged that there be no change from the Hague Rules exclusion of live animals, noting in passing that the health and safety aspects were regulated by the Paris Convention.<sup>188</sup>

<sup>188</sup> European Convention for the Protection of Animals During Transport, Dec. 13, 1968. 2 Euro. Conv. & Agr. 374.

France favored the first proposal and opposed the second and third proposals, since the new convention should apply to live animals, subject to reasonable exculpatory clauses. Poland agreed.

Brazil preferred the second proposal to relieve the carrier of special risks inherent in live animal carriage. This was supported by Nigeria, Japan,<sup>189</sup> Chile, Norway and U.S.S.R. Norway justified live animal carriage by sea as being different from other carriage conventions because the journeys lasted longer, without opportunities for off-loading diseased animals.

The United States agreed that addition of a special provision dealing with live animals was justified, but, in the absence of statistical information about losses during the carriage of live animals, it was very difficult to choose the most appropriate solution. The first proposal opened the way to very broad exculpatory clauses by the carrier. The third proposal seemed unlikely to promote uniformity and would encourage litigation, thus the second proposal was the best of the alternatives, but did not adequately deal with the problem of special instructions: would the carrier's responsibility be diminished if the shipper provided no instructions? Belgium also disapproved of the three alternatives, but felt that the second proposal could be the basis of a compromise text.

Some delegations believed that an official manual prepared, perhaps by IMCO, on the carriage of live animals noting their characteristics and recommendations for care should be required in order to make the third proposal more acceptable.

The I.U.M.I. observer explained the insurance provisions which differentiated between live animals and other cargo because of the factor of the animals own activities, and that the length of sea voyages caused different risk calculations than those used in rail, road and air transport. Marine insurers would not provide all-risk cover for live animals but restricted the cover to such risks as grounding, sinking and fire. Because of the impossibility of ascertaining whether loss was due to bad handling or inherent risks, cargo insurers were unlikely to increase the coverage, and additional carrier liability would have to be met by special "P. & I." clubs.

The Chairman summarized the discussion, concluding that the first proposal had been rejected but that it was impossible to make an accurate tally of the shifting and alternative preferences involved in the

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<sup>189</sup> Japan proposed the addition of the following sentence to the second proposal,

"The carrier shall be liable when the claimant proves that the loss of or damage to the live animals was due to fault or negligence on the part of the carrier, his servants or agents."

second and third proposals. Accordingly, both proposals were sent to the Drafting Party to obtain a compromise.

In the Drafting Party the United States offered a new proposal which took into consideration the language used in a number of bills of lading for the carriage of live animals in United States export trade. This proposal was endorsed by Belgium, Japan, U.K. and the U.S.S.R. immediately and eventually by France and Norway. The proposal was accepted by a 10 to 7 vote in the Working Group and is now incorporated in Article 5(5) of the draft convention.<sup>190</sup>

With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

At the same time, a decision was taken to complete the definition of goods so as to include live animals. It was believed that such a reference was necessary in view of the long history of the exclusion of live animals from coverage.

Art. 1(4)

"Goods" includes 'goods, wares, merchandise and articles of every kind whatsoever including live animals.

*N. Definitions*

*(1) Definition of Carrier*

The Working Group again considered the problems which arise when the shipper contracts with one carrier (the "contracting carrier") and this carrier arranges to have the goods carried by another carrier ("the actual carrier"). General transshipment problems were also reconsidered.<sup>191</sup> However, the context of the discussion now also included the decisions

<sup>190</sup> Report of the Sixth Session (fn. 170 *supra*) para. 115(a)(1) and (2) at 44-45.

<sup>191</sup> See Part II of this article, 7 J. Marit. L. & Comm. 340-346.

In this connection, an early draft proposed by Poland dealt extensively with these questions.

taken by the Working Group Sixth Session with respect to the "documentary" scope of the application of the Convention, since the Hague Rules I(b) definition restricting contract of carriage only to contracts of carriage covered by a "*bill of lading or any similar document of title . . .*", had been expanded by a provision that the Convention shall be applicable to "*all contracts for the carriage of goods by sea.*"<sup>192</sup>

A majority of delegates had approved the language used in the fifth working session which placed responsibility on the initial carrier ("contracting carrier") and also on the "actual carrier" for the carriage performed by him in transshipment situations. That majority also agreed that the carrier with whom the shipper had made a contract of carriage should remain the "contracting carrier" and should be responsible under the Convention for the carriage to the port of destination despite bill of lading clauses that the contract of carriage was only between the shipper and the "actual carrier". Accordingly, it became necessary to have careful definitions of the parties to a contract of carriage.

France proposed the following definition of carrier:

The carrier is the person or the enterprise which takes charge of particular goods and undertakes to move them in order to direct them to their ports of destination. It is that person or enterprise which issues in his or its name the title document which serves as a receipt against handing over of the goods.

The United Kingdom and Norway immediately disapproved of the cumulative nature of the French proposal, noting that there could not be more than one carrier at the same exact time.

#### DEFINITION OF THE CARRIER

##### *Proposal by Poland*

1. "Contracting Carrier" means any person or enterprise who, acting on his own behalf, concludes with the shipper a contract for the carriage of goods.

2. "Actual Carrier" means the ship's operator who effects the voyage in performing the contract of carriage.

3. The term "Carrier" without any particular indication designates the contracting carrier as well as the actual carrier.

4. Where the contracting carrier has not been named in the bill of lading [or any similar document of title], it is assumed that the ship's operator is the contracting carrier as well. Where in the bill of lading [or any similar document of title] made out in accordance with the article [ ], the contracting carrier has been named inaccurately or falsely, the operator of the vessel upon which the cargo has been loaded is liable to the consignee or cargo owner for losses resulting therefrom; the ship's operator may have a recourse claim against the contracting carrier.

<sup>192</sup> Report of the Sixth Session (fn. 170, *supra*) para. 121 at 48.



The United States said that that was the exact nature of the problem of a single definition; one must not force the cargo interest to chase phantom "carriers" when there were in fact many participants in the movement of a single shipment.<sup>193</sup> Of course, cargo was not entitled to double recovery, but the rights of the cargo interest must be made interchangeable so that the cargo owner was certain of a recovery from either an actual carrier or the contracting carrier. The United States could agree with the following cumulative definition,

"Carrier" includes but is not limited to anyone who enters into a contract of carriage with the shipper and anyone who undertakes to perform the contract of carriage.

If the French cumulative formula were preferable, then it might be

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<sup>193</sup> *In Mente & Co. v. Isthmian Steamship Co.*, 36 F.Supp. 278 (S.D.N.Y. 1940), aff'd. 122 F.2d 266 (2d Cir. 1941) the time charterer (as well as the shipowner) was bound by bills of lading signed on its regular form after having solicited the cargo for the voyage. (See also *Compagnie de Navigation Fraissinet & Cyprien Fabre S.A. v. Mondial United Corp.*, 316 F.2d 163 (5th Cir. 1963); *Joseph L. Wilmotte & Co., Inc. v. Cobelfret Lines, S.A.R.L.*, 289 F.Supp. 601 (S.D. Fla. 1968).

Freight forwarders may or may not be considered as carriers depending on whether their activities involve merely "arranging" or actually "effecting" the shipment. (See *J. C. Penny Co. v. American Express Co.*, 102 F.Supp. 742 (S.D.N.Y. 1951) aff'd 201 F.2d 846 (2d Cir. 1952).

Under United States law a person may be considered a common carrier by water even though he does not own or operate the physical facilities of carriage. The Federal Maritime Commission recognizes that an ocean forwarder or other person may become a non-vessel operating common carrier by water (NVO) when he (a) holds himself out to provide transportation for hire by water in foreign commerce; (b) assumes responsibility or has liability imposed by law for the safe transportation of shipments; and (c) arranges in his own name with an underlying water carrier for the performance of such transportation. *Common Carriers by Water—Status of Express Companies, Etc.*, 6 F.M.C. 245 (1961).

Under this doctrine, a forwarder may serve as a water carrier if he goes beyond arranging the details of transportation and actually assumes responsibility for the safe transportation of the goods. (See *J. C. Penny Co. v. American Express Co.*, supra.) The forwarder would become an NVO by filing his tariff as a carrier with the Federal Maritime Commission (See generally, G. Ullman, *The Ocean Freight Forwarder, The Exporter and The Law* (1967)). While a forwarder (or any other person) as an NVO can offer service as an ocean carrier from a U.S. port to an overseas destination, he cannot at the present time issue a through bill of lading from an interior U.S. point to a foreign port (See, Ullman, *The Role of The American Freight Forwarder in Intermodal, Containerized Transportation*, 2 *Journal of Maritime Law and Commerce* 625 (1971). Whether an NVO will be permitted to enter into joint-rate agreements with land carriers for a through movement depended on the outcome of a complex controversy between the F.M.C. and I.C.C., reflected in a proceeding before the Interstate Commerce Commission. See *Ex Parte 261, Tariffs Containing Joint Rules, Etc.*, 337 I.C.C. 625; 341 I.C.C. 246; *Port Royal Marine Corp. v. United States*, 378 F.Supp. 345 (S.D. Ga. 1974), aff'd. 402 U.S. 901 (1975). Congress resolved the controversy clarifying the law in favor of the F.M.C., 46 U.S.C. 804, as amended by P.L. 93-605.

The "demise clause," denounced because of the possibility that the shipper would have no rights against the charterer who issued the bill of lading and no rights against the shipowner who was not formally the carrier, has not caused major problems to cargo owners in the United States since the courts have refused to give it effect as against H.R. III(8). COGSA §1303(8) forbidding clauses in the bill of lading which lessen the liability of the carrier. See *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949).

acceptable to combine the concepts of bill of lading issuer with receiver of cargo (taking in charge) and alternating these concepts with the performance of the actual carriage, thus, a formula based on the French proposal might be framed, as follows,

“Carrier” is anyone who takes charge of particular goods, *and* issues in his name a document of title or receipt for the goods, *and* who undertakes to move the goods to the port of destination, *or* who performs the contract of carriage.”

It soon became apparent that it would not be possible to solve transshipment problems through the definitional article, accordingly the Drafting Party sought solutions which would give rise to the maximum amount of support because of vagueness. The full meaning of the expression “in his own name” was not considered, and would cause problems at later sessions.

The Drafting Party proposed the following definitions which were approved:<sup>194</sup>

“1. “Carrier” or “contracting carrier” means any person who in his own name enters into a contract of carriage of goods by sea with the shipper.

“2. “Actual carrier” means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.”

## (2) *Definition of Ship*

Most delegations felt that a definition of “ship” would no longer be necessary because of the suggested revision of Article I(d), extending application of the Convention to the “period during which the goods are in the charge of the carrier.”<sup>195</sup> This change should resolve also the uncertainties which had arisen under the 1924 Convention as to whether the Convention applies to barge or lightering operations carried on by the carrier under the contract of carriage. It was therefore decided to place square brackets around the present definition of “ship” in Article I(d) and to defer decision in the matter to another session, when it was deleted.

## (3) *Definition of Goods*

The definition of “goods” was a policy matter considered at the third, fifth, sixth and seventh sessions wherein the definitions of Article I of the

<sup>194</sup> Id. para. 133(a)(1) and (2) at 52.

<sup>195</sup> See Part I of this article, 7 J. Mar. L. & Comm. 77-84.

Hague Rules (which excluded deck cargo and live animals) were modified into the new Article 9 treatment of deck cargo and the new article 5 treatment of live animals.<sup>196</sup>

#### (4) *Definition of Contract of Carriage*

During the heated debates on the bill of lading definition, the subject of defining the contract of carriage was also attempted. At one point the only agreement was to define it in the following way, "Contract of carriage means a contract of carriage." However, when it became apparent that the debate on the definition of carrier and actual carrier could not resolve the policy questions raised by transshipment, it was proposed to use some of the language which had been proposed as part of the definition of carrier to define the nature of the contract of carriage.<sup>197</sup>

5. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered.

#### (5) *Definition of bill of lading*

Article 3 of the Hague Rules (46 USC 1303(3)) deals with the contents of the bill of lading without defining it, since in fact the basic presumption of the Hague Rules was that the Convention would deal with carriage of goods by sea only through the medium of the bill of lading. The Fourth Report of the Secretary General<sup>198</sup> assumed that a more precise definition would be necessary in view of the likely expansion of the Convention to documents other than bills of lading, accordingly the Report proposed two alternative definitions: A-1, a very specific and inclusionary definition, and A-2 a very broad definition.

##### *Draft Provision A-1*

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for their carriage and by which a carrier undertakes to

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<sup>196</sup> See fn. 190, *supra*.

4. "Goods" means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

<sup>197</sup> Report of the Seventh Session, U.N. Doc. A/CN.9/96 of 18 November 1974, paras. 99-103 at 33.

<sup>198</sup> Report of the Secretary General, Fourth Report on Responsibility of Ocean Carriers for Cargo: Bills of Lading (U.N. Doc. A/CN.9/WG.III/WP. 17 (Vols. I and II) of 13 August 1974), paras. 4-13 at 8-12.

deliver the goods only to a person in possession of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking.

*Draft Provision A-2*

“Bill of lading” means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [or assigns] of a named person or to bearer.

India began the debate with a demand for certainty to protect the small shipper, and for that reason insisted that only bills of lading with well-known mandatory contents should be given effect.

Norway described the bill of lading as a *negotiable* type of document for carriage by sea, all other documents having the main function of evidencing the goods in question—a document of presentation which must be surrendered to obtain the goods. A second essential of the bill of lading is that the person claiming under it must appear to be the due holder. Article A-1 did not adequately cover this point; merely stating the necessity of a showing of entitlement to claim the goods. Nevertheless, although it was unnecessary to include a specific reference to negotiability, there should be a statement that the document had to be surrendered and, if the claimant was not the original consignee, there must be appropriate endorsements.

India then proposed that there be a short definition, and then coverage of the legal effects of the bill. Argentina supported India with respect to the certainty of the bill of lading, with mandatory contents, and then noted that goods are sometimes delivered to customs officials, who effect actual delivery to consignees on receipt of the bill.

Singapore suggested that A-1 be changed to allow for cases where the bill was surrendered to take possession of the goods,—the normal practice, thus it would not be necessary for the customs problem to be included in the convention. Since customarily several original copies are issued, the question arises as to which copy is to be negotiable. It is unwise to state that the goods had to be delivered against surrender of the bill—the matter should be left to commercial practice.

Germany noted that a definition might prove to be too difficult at this time and that perhaps it would be best for a simple definition to make references to later substantive provisions.

France, then introduced the following definition, adopted from Draft Proposal A-2.

“Bill of lading” means a document which proves the existence of a contract for the carriage of goods by sea and which records the taking over of

those goods by the carrier and his undertaking to deliver them, against surrender of this document, to the order of a named person, or to that person's assigns by way of endorsement, or to bearer.

The French proposal was endorsed by the United States with a caution to those who would force the maritime industry to use complex bills of lading. Such provisions would be an unnecessary hindrance to commerce, and where both shipper and carrier are satisfied that a bill of lading is unnecessary, it would be a commercial mistake leading to inefficiency and waste to force the use of the bill of lading under all circumstances.

The United States view with respect to the option of the parties was immediately opposed by India and Argentina, demanding greater certainty for small shippers and consignees against the carrier interest, although endorsing Draft Proposal A-2.

The Chairman then summarized what he felt to be the key feature of the definition: negotiability, surrender of goods on presentation, appearance of legitimate status as holder. Accordingly he believed that an amended version of A-1 could be referred to the Drafting Group. This discussion appeared to eliminate the so-called "Straight" or non-negotiable bill of lading which was not widely used in international trade. Preservation of the straight bill, however, will be effected under Article 18 of the draft convention. The following definition of bill of lading for the purposes of this Convention was approved:

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

#### *(6) Definition of Consignee*

There was general agreement, with the exception of France, on the definition of consignee. France proposed to substitute "l'ayant droit", that is the person having the right to the goods. After an extensive debate at the eighth session there was no support for the French proposal and the traditional definition was adapted, as follows:

3. "Consignee" means the person entitled to take delivery of the goods.

O. *Contents and Legal Effects of the Bill of Lading and Other Documents Evidencing the Contract of Carriage.*

(1) *Contents of the Bill of Lading*

The Hague Rules provisions respecting mandatory contents, without preventing the addition of other information, is found in Article 3(3)(a)(b) and (c). The only mandatory provisions were notations of:

- a—leading marks
- b—number of packages . . . or quantity, or weight . . . furnished in writing by the shipper
- c—the apparent order and condition of the goods.

The Secretary General's Report contained Draft Provisions B, C, D, E, F, G and a list of 9 additional items of required information making a total of 15 items of mandatory information for the bill of lading.<sup>199</sup>

At the start of the debate the United States noted that the existing provision was satisfactory and should not be changed. It was the private view of the U.S. Delegation that the way in which the Report of the Secretary General listed the items of information contributed to the stampede effect which caused the new draft to contain fourteen mandatory provisions.<sup>200</sup>

Norway proposed the simplification of 3(3)a of the existing Hague Rules.

The Chairman then proposed to consider each item in the existing provision and then discuss each of the proposed additions to the text. First the Chairman asked whether §3(3)(b) of the Brussels Convention be altered to read "*and*" instead of "*or*"? "*And*" would mean that the number of packages *and* weight must be listed in the bill of lading. Of course, such a provision would be required if the unit limitation of liability (Article 6) were to be fixed solely by weight.

France, supported by O.C.T.I., said that quantity is too imprecise, a very general concept. Perhaps "volume" was more appropriate.

Argentina supported "*and*". Both listings should be required. Also, there should be an obligation to include a brief description of the goods, as is normally done in practice any way. This was supported by India and Chile.

Japan opposed "*and*", preferring "*or*". Japan agreed with the United States that the existing provisions in the Hague Rules were satisfactory.

<sup>199</sup> Id, paras. 25-52 at 14-25.

<sup>200</sup> Report of the Secretary General (fn. 198 supra), paras. 51-2 at 23-5.

Singapore said that a prospective purchaser of a bill of lading requires it to contain as much information as possible, therefore the nature of the goods should be specified in the bill of lading. France, however, said that any description of the goods would have to be very general, since such particularity would be impossible in containerized transport and might even be harmful.

The Chairman summarized and said the bill must include the weight and should include a description of the goods as far as possible, referring the matter to the Drafting Party.

Thereafter there was a considerable debate about "packaging": whether there is or should be a cause of action for damages to packaging where there was no damage to cargo. This debate was set off by the mandatory statement of the apparent order and condition of the goods.<sup>201</sup>

Germany argued that as to §3(c), the term "*goods*" in the Hague Rules clearly included packaging, and therefore Draft Provision D should be added to the Convention along with Draft Provision C. The nature of the goods should be stated, but a carrier should be allowed to enter a reservation to the effect that it is unable to make an assessment of the quality of the goods. A vague descriptive term such as "general merchandise", however, would not be appropriate in a bill of lading.

The USSR preferred the existing provisions, however Draft provision C might be acceptable—a container might in fact belong to the shipper. Draft provision D would involve a major expansion and would not be desirable.

Singapore said the phrase "apparent order and condition of the goods" was time-honored and should be retained. There was no existing provision requiring the carrier to state visibility conditions (e.g., floodlights) at the time of loading. There was now no requirement that a carrier examine the goods. Examination should also include smelling them. It should also be made clear for containers whether the carrier should be required to state the condition of the individual packages or the exterior of the containers. Draft Provision C was preferable, although Draft Provision D would be acceptable also.

Norway noted its agreement with Germany that the condition of the packaging at the time of loading was important. If damaged, it was likely

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<sup>201</sup> Hague Rules, Art. 3 (3)(c).

"After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

\* \* \*

(c) The apparent order and condition of the goods.

that the goods were damaged also, and the carrier would be liable for damage to packaging and the cost of repacking. As a result, draft provision D was preferable. This was supported by France.

Japan opposed Draft Provision D. The addition of the words "all packaging" to the end of Draft C was preferable, otherwise, reference to packaging independently might create the dangerous interpretation that there was a new cause of action for damage to packaging. Poland agreed with Japan.

The I.C.S. stated that the original wording should not be changed unnecessarily. The packaging inspection would force carriers to make much more careful study and inspection of goods, thereby slowing down maritime transport, which would benefit no one.

Argentina said Draft Provision C was preferable, Provision D was not sound, since it was not in the interests of carriers or shippers to equate a container with the goods, and unsatisfactory interpretation might result. The Philippines said "C" is preferable to having a broad definition of the word "goods", but "C" and "D" were not mutually exclusive.

The United States disapproved Draft Provision D as unnecessary. There was not now a rash of cases where shippers were suing for damages to packaging when there was *no* damage to the cargo itself. Undoubtedly, under the present rules there could be recovery for damage to cargo and packaging, but it would be a mistake to "spot-light" a possible cause of action for damage to packaging alone. It might be a monster which would be regretted for practical reasons, despite the theoretical symmetry from Draft D. If a choice had to be made, C was preferable. An attempt was then made to describe actual operations on the dock when goods are shipped and the bill of lading, prepared by shippers, was issued. The United States pointed out that much of the dissatisfaction with the present 3(3)(c) had to do with the practice of banks regarding documentary letters of credit, something which this Working Group could do nothing about. Rule 16 of the 1962 ICC Uniform Customs & Practices summarized the case law on the distinctions between clean and foul bills of lading, but the temptation to carriers to declare all shipments in bad condition, thereby fouling the bills of lading, had not happened in fact because shipping remained a very competitive industry.

India desired a clause incorporating both C and D. Chile and Nigeria agreed.

Singapore noted that the quality of the packaging is important to third parties. Bill of lading holders must be able to establish where packaging damage occurred, and the carrier should be prevented from disclaiming liability.



The I.U.M.I. said that few cargo policy claims were now made for packaging damage alone; generally only for containers. In that respect, "C" would normally be taken to mean packaging of little value, while "D" expressly referred to containers and crates. Furthermore, "C" deals only with the formality of entering information on the bill of lading, while "D" extended the scope of the general responsibility of the carrier by equating packaging with goods.

The C.M.I. agreed with the U.S. that any problems in describing goods arose from the role of clean bills of lading in documentary letters of credit. Draft "C" might induce carriers to add unnecessary reservations on bills of lading while Draft "D" would not have that effect, as it merely extended the definition of goods. Chile also feared that "C" would induce unclean bills. Would the carriers liability be limited if he did state that the packaging was not in good order? He was not sure.

The United Kingdom stated Draft "C" was acceptable. Draft "D" was not, if it meant that the carrier must insure that the packaging also arrived in good condition. Cases where the packaging itself was of value and intended for re-use are covered in provisions already considered. Argentina agreed that "D" would make the carrier liable for damage to packaging.

Norway believed "D" would not create a new cause of action. The claims would still have to be brought under national law; its purpose being to bring all liability problems under one set of rules. Also, such claims are presently made anyway.

Germany was in favor of "D", believing it would not lead to unjustified claims. Nevertheless, it would be wise to specify that the provision did not apply to deterioration in the normal course of handling, even though the definition of damage would perhaps render this unnecessary.

The United States agreed that uniform rules were necessary, and that claims for damages to packaging were presently allowed, nevertheless it would seem to be an abuse of the new rules if there would now be claims for damage to packaging alone. If "D" were used, the unit limitation of liability would give adequate protection against *de minimis* claims, but, if further protection against abuse was desired, the unit limitation could be lowered for damage to packaging—leaving three levels: packaging, delay and ordinary damage in the Unit Limitation Provisions. This, however, would be a burdensome complication of the text.

The I.C.C. noted that in requiring the condition of the packaging to be mentioned, the text might make it absolutely clear to banks that the comment referred only to packaging and not the goods. However, it would remain uncertain how the banks might interpret this.

Because no consensus was apparent the Chairman took an indicative vote, as follows:

No change in §3(3)(c) .....	8
"C" .....	9
"D" .....	7
Both "C" & "D" .....	8
One provision combining "C" & "D" .....	1

Belgium observed that the question of the mandatory contents of the bill and the legal effect of the insertion or omission of reference to the condition of the goods should be clearly separated from the question of carrier liability for packaging. Accordingly, the Working Group's text reflected Draft Proposal "C" in the definition of goods.

Then Norway began the discussion of the lists of proposed mandatory inclusions. Any of the alternatives would be acceptable because the crucial issue was the kind of reservations which the carrier would make. For example, in addition to the apparent order and condition of the goods, the carrier must also mention packaging damage, defects and insufficiency under Norwegian law—that is, a duty to make statements on the bill of lading as to those subjects.

Germany, with the concurrence of Norway & U.K. said that information on the nature and apparent order and condition of the goods should be required.

France felt the name and principal place of business of the carrier, or actual carrier but not the "contracting carrier," should be required. Norway disagreed in view of the fact that the actual carrier is not known at the time of issuance. Accordingly, only the name of the contracting carrier should be required. The C.M.I. observer agreed the word "contracting" should be retained if the contracting carrier was to be held liable; otherwise he could merely insert the name of the actual carrier.

France noted that this problem would be solved by reference to the definition of terms. The term "contracting carrier" only had a special meaning when there was also an actual carrier.

France also felt the place of business would be valuable, because it determined the applicability of the convention, however, the date of issuance served no function; rather, the date on which the carrier took charge of the goods would be more useful as it would establish the period of carrier liability, and should be required. Chile and Norway agreed.

The French proposal was adopted by a vote of 10 in favor, 4 opposed, 2 abstentions.

At this point in the debate there was a diffuse discussion of added mandatory provisions. Unfortunately, the Secretary General's Report

lumped all the suggestions together, and many of the speakers assumed that all of these were of equal importance. The Draft Provisions were:

Para. 50: "G"—The place and date of its issuance;

- Para. 51: (i)—The ports of loading and discharge under the contract of carriage;  
(ii)—The name of the vessel on which the goods are loaded;  
(iii)—Description of the nature of the goods covered by the bill of lading;  
(iv)—The signature of the carrier;  
(v)—The freight charges on the shipment;  
(vi)—The number of originals of the bill of lading;  
(vii)—The name of the shipper;  
(viii)—The name of the consignee;  
(ix)—Detailed provisions as to negotiability;

India supported inclusion of all proposals but Negotiability Provisions for mandatory contents.

Poland proposed an additional item: the duration or amount of the vessel's demurrage or detention, since Polish law required that owners' claim in respect of demurrage had to be based on indications in the bill of lading.

Singapore supported all items, since they were in accord with commercial practice. The ports of loading and discharge were necessary for export/import licenses and consular formalities. The vessel's name and the date of shipment were necessary to take out a marine policy. Hungary agreed that (i) ports of loading and discharge were important since they determined the applicability of the convention.

Germany believed that careful thought must be given to the effect of *non-inclusion* of one of the items. There should *not* be a requirement of detailed provisions regarding negotiability. In view of the use of mechanical reproduction of signatures, the term "signature" should be defined.

France favored mandatory inclusion of items (i)—(viii), but not (ix). As to (iv) Carrier signature, he proposed the addition of the term "or his agent". As to item (v) (Freight) he proposed the addition of, "or the notation that freight has been prepaid". As to item (viii) (Name of Consignee) he proposed the addition of, "except if the B/L is made out to order or to the bearer". Respecting the effect of omission, he felt the wisest course would be to leave to the competent court in each case to decide whether the omission had caused any damage to the party invoking the omission.

Norway noted that items (i) & (ii) were clearly appropriate for "on

board" or "shipped" bills, but not for "received for shipment" bills. In no case should invalidity result from the omission of any item. He suggested that the provisions be worded to allow the shipper to request the inclusion of the items, and obligate the carrier to comply with the request. It would also be necessary to provide that the carrier could print or stamp its signature. The notation of prepaid freight should be required, but negotiability should not be discussed in this context.

Nigeria agreed with India. It was important that all items be required. In Nigeria, importation from certain countries was prohibited and from certain others was licensed, thus his country now required the information on the port of loading. The number of originals might be left to current trade practice, which varied, but only a "statement" as to negotiability should be required. He would be satisfied by the stamping of the word "negotiable" on the bill of lading.

Argentina argued that the omission of terms on the apparent condition of the goods and the fact of freight due on arrival would be the equivalent of notations that the goods were in apparent good order and that no freight was due on arrival. The omitting carrier would be responsible under Draft Provision C to the holder for any loss resulting in good faith from that omission.

The United States opposed any further addition to the Hague Rules list of required items. New mandatory provisions would be impediments to commerce. Undoubtedly carriers would have no objection to including whatever information the shipper desired, and the matter should be left to agreement of the parties. The proposed items would be found on most printed bills and did not require international regulation. Usually the bill was typed up and prepared by the shipper, therefore the carrier ought not to have the burden of insuring that all required information was contained.

The proposed requirement of a signature would perpetuate a meaningless ritual. Furthermore, in view of the increasing use of electronic data-processing equipment in the North-Atlantic trade now it would present an impossible burden to commerce. The question of indicating prepaid or collect freight might conveniently be left to national legislation. As to item (vi) (Number of Originals), the purpose of more than one original developed in the 1940's and 1950's in that one copy would be sent by seamail and two copies by airmail. With the increasing deterioration of the postal systems throughout the world, the goods often arrived before any of the copies, thus the use of electronic data processing became a practical necessity. Since the name of the consignee might not be known at the time of shipment, it was an unnecessary

requirement. The notation "*order*" or "*bearer*" should be enough to satisfy the negotiability requirement. He reiterated that none of the proposed items (i)–(ix) should be made mandatory, although the proposed uniform bill of lading of N.C.I.T.D. did contain most suggestions.

Chile supported the mandatory inclusion of all additional items, including a proviso as to prepaid freight, and the name of the consignee if not a bearer bill, however, he concurred in the elimination of item (ix) (Negotiability). Respecting the effect of omissions, the relative importance of each item and the effect on the burden of proof would have to be determined for each of the contents by national courts. Perhaps bills of lading without these mandatory contents could not be offered in court by the Carrier.

India felt the signature was necessary to allow detection of stolen documents. Also the notation of freight charges would lead to greater confidence in the shipping world.

The U.S.S.R. felt the only item absolutely necessary was (i) the ports of loading and discharge because these determined the application of the convention. Items (ii)–(viii) should remain optional, because the effect of their omission was uncertain and there was no reason why the carrier would not include them. Belgium also objected to the provisions on negotiability, freight, and name of consignee as impractical. Belgian law forbade more than one original bill.

Tanzania felt the mandatory inclusions would not necessarily slow down trade, and speed was not the only consideration. The system must be accurate and must protect consignees more adequately. He strongly supported item i, ii, vii and viii.

The I.U.M.I. noted that none of the items (i)–(viii) were necessary for marine insurers, who based coverage on declarations of the insured. He insisted that (iii) description of the goods, would be helpful only to thieves.

The I.C.S. supported the U.S. position. Carriers had no objection to voluntarily including such information at the request of the shipper.

Norway felt the legal effects of non-insertion should have no relation to the validity of the bill of lading.

Ghana agreed that non-insertion should not result in invalidity noting, however, that the items thought to be necessary by the developing countries should be supported.

Discussion of a special provision for shipped bills of lading proved to be unnecessary. There was general agreement that Draft Provision H was better and simpler than Art. III (7) of the Hague Rules.

To assist the drafting of the provisions on all the foregoing matters the Chairman of the Drafting Group formulated a text on the Contents of the Bill of Lading, as follows,

1. The bill of lading shall show:
  - (a) the general nature of the goods, the number of packages or pieces, their marks and numbers, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper; and
  - (b) the apparent order and condition of the goods.
2. The bill of lading shall also contain the following particulars:
  - (a) the name and principal place of business of the contracting carrier;
  - (b) the port of loading under the contract of carriage and the date on which the goods were taken in charge by the carrier at the port of loading;
  - (c) the port of discharge under the contract of carriage; and
  - (d) the number of originals of the bill of lading.
3. At the request of the shipper, the carrier shall include the following particulars in the bill of lading:
  - (a) the freight; if applicable, a statement as regards prepaid freight;
  - (b) the name of the shipper;
  - (c) the name of the consignee.
4. (= draft provision H excluding "the port of loading")
5. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the contract of carriage evidenced by bill of lading.

Thereafter the Drafting Group reworked this text. Reservations were made concerning the problem of "packaging"; the preference for the disjunctive "*or*" instead of the conjunctive "*and*" in the reformulation of the existing mandatory contents provisions of the Hague Rules, and the view of the U.S. delegation and Japan that there should be no additions to the present text list of mandatory contents provisions. The phrase, "among other things," was added to the first provision to meet the needs of Poland respecting demurrage, by vote of 6 in favor, 4 against with 5 abstentions.

The text offered by the Drafting Group, approved by the Working Group and now found in Article 15 of the draft Convention follows:

#### *Contents of Bill of Lading*

1. The bill of lading shall set forth (among other things) the following particulars:
  - (a) the general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

- (b) the apparent condition of the goods including their packaging;
  - (c) the name and principal place of business of the carrier;
  - (d) the name of the shipper;
  - (e) the consignee if named by the shipper;
  - (f) the port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;
  - (g) the port of discharge under the contract of carriage;
  - (h) the number of originals of the bill of lading;
  - (i) the place of issuance of the bill of lading;
  - (j) the signature of the carrier or a person acting on his behalf; the signature may be printed or stamped if the law of the country where the bill of lading is issued so permits; and
  - (k) the freight to the extent payable by the consignee (or other indication that freight is payable by him).
2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1, shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.
3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

At the Closing Plenary France, supported by Belgium, Chile and Argentina sought to remove the adjective "general" from the phrase "nature of the goods" in the first sentence. It was decided that the French and Spanish texts might be prepared without the word "general" but that the expression was necessary in English and should be retained. Also there was another debate about the requirement that "freight" be stated in the bill of lading. Another attempt was made in the Plenary to delete or modify the provision respecting Freight. Essentially the arguments previously made were remade. During the lengthy discussion the strongest proponents recognized that the exact computation of the freight might not be known at the time of shipment and that there was no need to delay the shipment for such a computation, accordingly, a compromise solution was proposed whereby the phrase "or other indication that freight is payable by him" would be added to the original draft language "the freight to the extent payable by the consignee." There was no objection to comments that "Freight Prepaid" or "Freight Collect" notations on the bill of lading would comply with this provision.

The vote on the amended language was 10 in favor, 7 opposed, no abstentions.

At the Second Reading the United States offered a proposal on signature in Subparagraph (j) of paragraph 1 of Article 15 to expand the ways in which signatures can be affixed to documents. Concern had been expressed at meetings of the U.S. Study Group on Maritime Bills of Lading that the old formulation of subparagraph (j) might not cover modern methods of affixing signatures to bills of lading. At the request of the U.S. delegation paragraph 1 (j) of Article 15 was amended to make it compatible with such methods. The new text reads:

“The signature of the carrier or a person acting in his behalf; the signature may be in handwriting, printed, in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits.”

An additional U.S. proposal was the addition of a new paragraph to follow paragraph 1 to read as follows: “Any other means which would preserve a record of the particulars set forth in paragraph 1 may, with the consent of the shipper, serve as a bill of lading.” The purpose of the amendment was to make the convention compatible with electronic data processing methods used or to be used in the future in connection with transport documents. No representatives expressed the opinion that the new convention would not be compatible with present or future developments with respect to electronic or automatic data processing of bills of lading; however, some representatives stated that an amendment was not needed to accomplish the desired result. Following this discussion the Working Group decided not to adopt the U.S. proposal.

## *(2) Legal Effects of the Bill of Lading*

Draft Provision E was an amendment to the general proviso of §3(3) which now allows the carrier to omit from the bill certain types of statements supplied by the shipper. “E”’s purpose was to bring the convention into alignment with current commercial practice. Statements would be included in the bill of lading, but the carrier would also include reservations as to their accuracy. The debate now concentrated on the problem of reservations.

France suggested that §36 of the French legislation be used as the model. The carrier is not bound to insert particulars supplied by the shipper, but must give exact reasons for not doing so. If he does not give reasons, he cannot invoke limitation of liability or contest the shipper’s



claim. Argentina agreed with the French proposal. Singapore also agreed with the French proposal, generally, but suggested a proviso that the shipper should be deemed to have supplied accurate particulars to the carrier. This proviso would limit the effect of a standard reservation clause by the carrier and the carrier would be safeguarded by his right to indemnification from the shipper for inaccurate statements. The I.C.C. observer concurred with France and noted that this procedure had been adopted by the I.C.C. Uniform Rules for Combined Transport.

Germany believed Draft Provision E was too narrow, and suggested that the original wording be retained with the French provisions added thereto. As a result, the carrier would not be found to insert shipper's particulars, but if he did so, he would be free to enter a reservation. Germany had no objections to a requirement that the carrier give reasons for any reservations.

Norway noted that under the Uniform Customs and Practices on Documentary Credits, only a specific reservation as to certain particulars and not a general reservation made a bill unclean. The carrier should not be allowed to enter a reservation regarding information he could reasonably have verified by himself. Norway feared that a rule requiring reasons for reservations would not go to the heart of the matter and then suggested that draft provision "E" should be adopted with the following addition underlined:

"If a bill of lading contains particulars concerning the description, marks, number, quantity or weight of the goods, which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has not reasonable means of checking, the carrier shall [state] [specify] such reservation in the bill of lading. *Where the carrier has stated a reservation as regards particulars concerning the goods, such reservation[cannot be invoked] [shall be invalid] as against a third party acting in good faith if the carrier knew or ought to have known that such particulars were inaccurate and the reservation does not expressly refer to such inaccuracy.*"

The carrier should take reasonable steps to insure the accuracy of information on the bill of lading under the present convention, thus, the carrier should delete information when he was not in a position to check on it. This is not in keeping with commercial practice, since the unverified information was still needed. Commercial practice was to enter a reservation concerning the doubtful information, which was the substance of Draft Proposal E. Nevertheless, the carrier should be required to give reasons for any reservation. Under Norwegian law, a general reservation was insufficient where the carrier knew, or should have known of an inaccuracy.

France felt the Norwegian addition would be an improvement, but French law was preferable because more precise. Under French law, where the carrier had serious doubts concerning information supplied by the shipper, he could refuse to insert such information, but had to give reasons for doing so. This had worked well in practice. France then proposed a text, adopted from the French legislation.

“(1) If the bill of lading contains particulars concerning the nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier has substantial reasons to suspect not to represent accurately the goods which he has actually taken over, or if he had no reasonable means of verifying such particulars, the carrier shall make special note giving reasons for such impossibility of verification.

(2) In the absence of reservation permitted under the para. 1, the bill of lading shall be *prima facie* evidence that the carrier has taken over the goods as they were described in the bill of lading.

(3) However, proof to the contrary shall not be admitted when the bill of lading was transferred to a third party holder acting in good faith.

(4) Those particulars in the bill of lading which are the subject of reservations permitted under para. 1 do not enjoy the benefit of the presumptions provided for in para. 2.”

The C.M.I. observer felt the situation was closely related to unit limitation of liability. Under Alternative “B” (Article 6),<sup>202</sup> goods packed in a container had to be enumerated to constitute separate shipping units. If the carrier refused to insert the information on contents, the unit limitation of liability would apply to the container as a whole. The INSA observer said the French proposal would create serious difficulties for arbitration courts by creating a complicated bi-level system of proof. Normally the shipper has the burden of proving that the information contained in a bill of lading is accurate, but the French proposal to require a carrier to set forth reasons for any reservation might lead to *standard reservations* to which standard objections would be made, pure formalism, thereby forcing the shipper to prove that the carrier’s reasons were inadequate.

Germany disagreed with INSA, but felt that the last sentence of the French proposal did not seem to be accurate. Under the Hague Rules, the shipper always had the burden of proving damage to the goods, and there was danger that the French proposal might in some way affect this presumption, therefore the following language was suggested as an addition: “*In case of such reservation, it is for the shipper to prove that, despite the reservation, the carrier had received the goods in the quantity*

<sup>202</sup> For Article 6, Alternative B, see the Second Part of this article, fn. 114, 7 J. Mar. L. & Comm. 334.

and state described." Germany felt strongly that the shipper should not be able to invoke the presumption of delivery in sound condition.

France replied that the last sentence reversed the normal presumption of liability in some circumstances. The burden of proof is on the shipper, of course, to show that some material damage has occurred, but once that is done the carrier is automatically presumed liable. Under French law, the presumption does not apply where the carrier entered a reservation upon suspect information and gave his reasons.

The O.C.T.I. representative suggested that it might be useful to specify who is legally responsible for completing the bill of lading. Also, the point raised by CMI was valid. Where the goods were delivered in poor condition, the shipper had to show that the goods were handed over to the carrier in good condition. Under French case law, the absence of any notation on the bill established an absolute presumption that the goods were delivered in good condition. Under German case law, obvious damage placed the burden of proof on the carrier, while damage that was not obvious placed the burden on the shipper.

Chile said that the Brussels convention had created two periods of responsibility—the first when the shipper guaranteed the accuracy of the information in the bill; the second when the carrier accepted responsibility on the basis of the document he received. Under consideration now was the question when the carrier was entitled to express a reservation altering the presumption of liability. The Norwegian proposal was much too wide and the French proposal was preferable, but the last sentence seemed irrelevant. A reservation does not affect the question of proof of damage because there are other ways of proving the condition of goods at the moment of handing over. Singapore concurred and noted its approval of the French proposal also. Singapore felt that the French requirement of "serious reasons" offered adequate protection against a carrier's possible abuse of the right to make notations on the bill of lading. However, the last sentence seemed unnecessary, since, if the information was not inserted, it did not constitute *prima facie* evidence. It was inappropriate to require the carrier to state the apparent condition of the goods and thereby provide the consignee (who has the burden of proof) with *prima facie* evidence. The French proposal was supported in its entirety, since the requirement of a statement of reasons is to protect the *consignee*, whose only source of information is the bill of lading. Argentina believed the question as to who was responsible for preparing the bill was irrelevant since the carrier's signature was the event that gave legal effect to the bill of lading.

Belgium did not agree. Draft provision E was favored as a reflection of

existing commercial practice, while the Norwegian proposal would also be acceptable. Belgium had misgivings about the last sentence of the French proposal. Under Belgian law, both bill of lading statements and carrier reservations were taken into account equally in assessing the carrier's liability. The requirement that the carrier must state reasons for suspicion or impossibility of checking would impose an unduly heavy burden on the carrier and slow up operations.

France again insisted on the adoption of his proposal. The French statute had been enacted to combat an abuse in the Hague Rules by which "general reservations" had become standard clauses for carrier exoneration of liability. While the Norwegian proposal represented an improvement over Draft E, it only protected a third party, not the shipper or consignee, whereas the essential feature of the French proposal was the required statement of reasons which would protect the cargo interest.

Draft Proposal E was then defended on the ground that commercial practice had diverged from the Hague Rules; the latter permitted the omission of information, but this was not followed in practice because of bank letter of credit usage. The bank needed the information, even if it was unverified. To reconcile practice and law, therefore, Draft "E" did not permit omission, but allowed more specific reservations to be made. The Norwegian proposal was an improvement on E. In sealed container shipments, the shipper's description was checked very rapidly by the carrier. The French proposal did not deal with the description of the goods, it dealt only with the limited "marks, number, quantity, weight or condition" of the Hague Rules. The big question was how to deal with goods shipped in a container. The Draft "E" answer conformed with practice in that specified reservations, rather than omissions, were allowed.

Japan said that in view of commercial practice with regard to issuance of letters of credit, the French proposal was impracticable, and Draft provision E was better. Japan questioned the Norwegian proposal—what if the carrier knew of an inaccuracy but had no way of determining the true facts—e.g., incorrect weight being apparent—How would that be reflected in the Bill of Lading?

The United States noted that there were no irreconcilable differences in the proposals and that there were valuable elements in each, but that the important elements had been mixed together in the discussion. For that reason the United States offered a Proposal, redrafting and combining Draft Proposal E, the Norwegian amendment and the French legislation.

*Amendments to Draft Proposal E proposed by the United States*

(1) The carrier or his agent may refuse to insert in the bill of lading declarations proposed by the shipper concerning the marks, number, quantity, weight or apparent order and condition of the goods and their packaging, provided that the carrier has reasons for suspecting the accuracy of such declarations or if there are no reasonable means of determining the facts.

(2) The carrier who refuses such shipper declarations [in accordance with sec. 1 *supra*] may insert the declarations proposed by the shipper together with his declaration (or reservation) concerning the goods which states his specific suspicions of the accuracy of the declarations or the reasons why it was impossible to determine the facts.

(3) Carrier declarations (or reservations) made in accordance with sec. 2 *supra* shall be invalid against a third party who has purchased the bill of lading in good faith and without knowledge of the reservations.

The United States argued that any provision to be adopted should reflect existing commercial practice where there is divergence from existing law. Thus, notations by the carrier showing differences in the cargo from the description prepared by the shipper were used, but the law must indicate that such reservations should not be made lightly. They should not constitute exoneration from a whole category of future claims. Lastly it is essential that good faith purchasers of the bill of lading be protected against possible fraud.<sup>203</sup>

<sup>203</sup> In accordance with COGSA 1303 (3); H.R. III (3), the carrier or the master or agent of the carrier, on the shipper's demand, shall issue a bill of lading showing: Leading marks as furnished by the shipper before loading; the number of packages or the number of pieces or the quantity of cargo received or the weight of the cargo received, as furnished by the shipper; the apparent order and condition of the goods. By the terms of COGSA 1304 (5), the shipper may also declare the nature and value of the goods before shipment and insert same in the bill of lading; there being customarily an additional fee for such a bill of lading. Furthermore COGSA 1310 concerning bulk cargoes provides that when the weight of the bulk cargo has been ascertained by a weigher other than the carrier or shipper and is stated in the bill of lading, such weight will not be *prima facie* evidence against the carrier as to the received weight.

In addition to the COGSA requirements, the Pomerene Bills of Lading Act, applicable to bills of lading issued in the United States, requires that the carrier who has loaded cargo count the number of packages shipped, and to ascertain the kind and quantity of bulk cargo (49 U.S.C. 100). However, where the shipper has loaded the cargo, for example, in cases of bulk cargo, the endorsement indicating shipper's weight, load and count may validly be inserted by the carrier in the bill (49 U.S.C. 101).

The carrier's duty to account precisely for the goods described in the bill is strengthened by the provisions of the Pomerene Act (49 U.S.C. 102) which prevents (or estops) the carrier from denying the accuracy of the description in the bill of lading after it has been negotiated. The statute says the carrier shall be liable to "... (a) the owner of goods covered by a straight bill of lading subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein, for damages caused by the non-receipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill of lading at its issue."

Norway again disapproved the French Proposal which would give the carrier the right to refuse to insert particulars. Such refusal would make the bill of lading unusable. The shipper would not be able to get credit from a bank. The basic purpose of any provision should be to protect a buyer of the bill of lading; to give him accurate information, thus the shipper should guarantee the information on the bill. It was the duty of the carrier to disclose inaccurate shipper information. The general reservation, which created the most problems, should not protect the carrier as against a holder of the bill of lading if the carrier knew or ought to have known the true condition of the goods; such provision being a better protection than a statement of reasons. To answer the Japanese question,—it was the carrier's duty to indicate such an anomaly on the bill of lading.

The I.U.M.I. observer said marine insurers would support any proposal which tended to reduce the effect of general reservations and ensure the accuracy of the contents of the bill. Draft "E" was a better approach. He feared the last sentence of the French proposal was so general in terms that it would lead to difficulties, and the term "ought to

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COGSA 1303 (3) (c) has a proviso not found in H.R. III (3) that the carrier is not bound to state any marks, number, quantity or weight which he has no reasonable means of checking or which he has reasonable grounds to suspect may not actually represent the goods received. Furthermore, COGSA 1303 (5); H.R. III (5) contains the shipper's guarantee of the accuracy of the marks, number, quantity, and weights as furnished by the shipper. COGSA 1303 (4) provides that the bill shall be *prima facie* evidence of the receipt by the carrier of goods as therein described . . . " and H.R. III (4) provides substantially the same thing, "Un tel conaissance vaudra présomption, sauf preuve contraire, de la réception par le transporteur des marchandises telles qu'elles y sont décrites . . . " Thus, the carrier is not absolutely liable for the shipper's description of the goods. The Pomerene Act, however, obligates a carrier who loads cargo to count the number of packages shipped and to ascertain the kind and quantity of bulk cargo, nevertheless, if the cargo is actually loaded by the shipper the carrier may endorse the bill of lading to indicate, "Shipper's weight, load and count." If the shipper of bulk cargo maintains adequate facilities for weighing which are available to the carrier, the carrier must ascertain the kind and quantity of bulk cargo shipped, upon shipper's request and upon being given a reasonable opportunity to do so. In addition to the *prima facie* liability for shipper's description referred to in COGSA 1303 (4), it will be necessary to refer to the language of the Pomerene Act (49 U.S.C. 102), applicable to bills of lading issued in the United States, which will estop the carrier from denying the accuracy of the bill of lading description, thus the description of the goods becomes conclusive as to carrier liability on negotiated bills. See, generally, *Mamiye Bros. v. Barber Steamship Lines Inc.* 360 F2d. 774 (2nd Cir. 1966) cert. denied 385 U.S. 835 (1967); *Commodity Service Corp. v. Hamburg America Line* 354 F2d. 234 (2nd Cir. 1965); *Portland Fish Co. v. States S.S. Co.*, 1975 A.M.C. 392.

COGSA 1310 adds a provision concerning the weight of bulk cargoes, as follows:

"Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper."

have known" in the Norwegian proposal would create considerable proof difficulties for shippers and consignees. Finally, he believed that the United States proposal was very close to commercial practice and could be approved.

Singapore felt that bank letter of credit practice was very flexible, therefore it should not greatly influence the drafting. Since the Norwegian proposal would impose on the *consignee* the burden of proof regarding the condition of the goods at the time of shipment it was not desirable.

France argued again that this proposal did not exclude the description of the goods under §3(3) of the Hague Rules, and in view of criticisms a new last sentence was proposed: "The burden of proof as to the condition of the goods at the time of their being taken by the carrier into his charge shall then be borne by the shipper or consignee."

Chile changed its position and now preferred Draft E, believing that the carrier should include the information, although entitled to note that the information was suspect or uncheckable. Chile continued to agree with France that reasons for a reservation should be given, and therefore proposed the following amendment to E. "If a B/L contains particulars concerning the description, marks, number, quantity or weight of the goods which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received or when he has no reasonable means of checking, the carrier shall specify such reservation in the bill of lading indicating the reasons for his decision or the reasons that had prevented him from checking the goods."

The C.M.I. observer said that due to the uses made of the numerous copies of bills of lading it was not practical to limit or delete much of the information currently included. An E.C.E. Committee was currently working to develop the "Liner Waybill"—a nonnegotiable and simplified alternative to the bill of lading which had already proved successful in Transatlantic container transportation. He supported the French proposal somewhat facetiously because it would lead to the eventual disappearance of the bill of lading; shippers would no longer ask for it since carriers might impose extra charges for its use. Only if the requirements of bills of lading were made flexible could they survive—especially so if only authenticated information could be used.

The O.C.T.I. representative said four questions must be answered in this debate, and the Chairman then took an indicative "cascade" of votes on the four propositions, as follows:

A—Is the carrier obliged to include in the bill of lading all statements

furnished by the shipper—description, marks, number, quantity and weight of the goods? The vote was 13 yes; 0 no; 1 abstains.

B—May the carrier add his reservations to the statements furnished by the shipper which are to be included in the bill of lading? The vote was 14 yes; 0 no.

C—(1) Must the carrier give a specific mention of the fact on which he bases his reservations? The vote was 15 yes; 0 no; 1 abstains.

(2) Must he also give specific reasons for his reservations? The vote was 10 yes; 4 no; 1 abstains.

D—Must there be a special rule on the legal effects of reservation made by the carrier on the bill of lading? The vote was 6 yes; 9 no; 2 abstain.

The debate then moved to a discussion of the evidentiary effect of the bill of lading with the interlocking question of the effects of carrier reservations to shipper supplied information and whether any special provision should be made for cargoes shipped in bulk as opposed to containerized shipments or cargoes shipped in boxes, bales and bags.<sup>204</sup>

Chile, with the concurrence of Argentina, said the same rules should apply to bulk and containerized cargo, however, there should be no necessity for opening sealed containers or packages, and the shipper's comments should be accepted. Singapore and Australia were in agreement with Chile and Argentina. The Draft Proposals were too sweeping, erroneously assuming that the carrier never played any part in the packing of the container. There was a need for flexibility here rather than rigid rules which would not allow for changes in commercial practice.

Germany stressed the close relationship between the question of reservation and that of unit limitation of liability. Must the carrier

<sup>204</sup> The Draft Proposals to be considered were:

*Draft Proposal J1*

"A bill of lading shall be *prima facie* evidence of the receipt by the carrier of goods as therein described, subject to the reservations permitted under para. 3. . . ."

*Draft Proposal J2*

"When the carrier fails to note on the bill of lading the apparent order and condition of the goods [including their packaging], or that freight charges are due on [arrival of] the shipment, for the purpose of para. 1 he is deemed to have noted on the bill of lading that the goods [including their packaging] were in apparent good order and condition and that no freight charges would be due on [arrival of] the shipment."

*Draft Proposal K*

"The shipper shall be deemed to have guaranteed to the carrier the accuracy, at the time the carrier took charge of the goods according to article [II A] of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies in such *information*. The shipper shall remain responsible under such guarantee even if the bill of lading has been transferred to a *third party*. The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper."



accept liability on the basis of the shipper's description of the contents of the container? It would be more appropriate to consider the whole question in the context of the liability rule.

The General Debate had already considered Draft Proposals J-1 and J-2 indirectly (See Paras. 74-77 *supra*), but the problem of bill of lading contents as evidence against the carrier was not directly confronted. It must be noted, however, that this question is also interlocked with the questions of validity of reservations and letters of guaranty.

The I.N.S.A. observer noted that the shipper would have to prove the truth of the information on the bill concerning which the reservations had been lodged. Under consideration now was the question of the persons to be affected by carrier reservations. The draft provisions confined the legal effects to the parties to the contract, but the holder should not be freed from these legal effects, because he received the bill complete with reservations and reasons.

Japan said that in Draft Provision K there was no reason for the words respecting a third party or a consignee. If the consignee was a holder he was already covered. Germany agreed with Japan that the consignee was logically a third party.

The U.S.S.R. noted that under the Hague Rules, disputed information was omitted and it was therefore logical that the bill of lading should constitute *prima facie* evidence of the receipt of the goods. As a result of the change of approach in Draft Provision E it would be necessary to change the wording of Draft Provision J-1. Also, it should be made clear from whom the bill of lading was *prima facie* evidence, since the Secretary General's Report gave the impression that it constituted such evidence only for the shipper. The United States agreed with the interpretation of the U.S.S.R.

Norway noted that courts have always considered the bill to have evidentiary effect only as to the apparent condition of the goods. In view of the fact that in Latin America the consignee was equated with the shipper, the second part of Draft Provision J-1 would have to be retained, and if not expressly included, his right to the same protection as a third party acting in good faith might not be recognized.

Egypt noted that under Egyptian law the consignee was considered to be a party to the contract and thus enjoyed the same protection as a third party acting in good faith.

Singapore feared that the Hague Rules *and* the draft provision did not protect a bank which accepted a bill as collateral if it were not formally assigned or transferred to the bank. Therefore, the provision should be amended to read "transferred or pledged to a third party acting in good faith, including any person having an interest in the goods." France

disagreed, saying that any bank giving a loan became a holder. There was no need to endorse the bill in favor of the bank for the bank to be protected as a third party acting in good faith.

Prof. Honnold intervened that by accepting the bill as collateral, the bank acquired rights in the bill, and in the case of default would undoubtedly be considered the person to whom the bill had been transferred.

Norway said that since the carrier's reservation might be based on lack of knowledge, it would be desirable to provide that *prima facie* evidentiary value be assessed on the basis of the description of the goods, with due regard for any permissible reservations entered in it. This would be more appropriate than a "subject to the reservations permitted" proviso. The conclusive evidence rule should be drafted so as to protect third parties misled by the description in the bill and acting in reliance on that description to their detriment. The protection of third parties should be based on estoppel, thus, a third party who had not acted in reliance on the misleading information, even though "in good faith", should not be given a cause of action. It should be made clear, however, that the reference does *not* apply to a consignee who was also the shipper or the shipper's representative. Other methods of protection were possible, such as a cause of action for misrepresentation against a carrier who failed to discover an inaccuracy he should have discovered.

Poland proposed a new Draft Provision:

"A bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, taking into account the reservations permitted under para. 3 of the article."

Also, if specific mention of the consignee was deemed desirable, it should read "a consignee who is not the shipper."

The United Kingdom noted that the rights of a third party transferee were generally protected by law—in the U.K. by the "Misrepresentation Act." The question was the rules of evidence, not a third party's right of action. The estoppel rule was implicit in the cause of action—it was unnecessary in a rule of evidence which presumed the existence of a cause of action.

Belgium said that express mention of the consignee was necessary. The contract of carriage was between the carrier and the shipper, and the mere mention of the consignee in the bill would not, as had been said by France, make him a party to the contract. France agreed with Belgium.

India said that if the shipper had stated 25 packages and the carrier reserved that only 24 existed only *one* package should be allowed to be disputed.

Norway said that the reason why some evidence should be *prima facie*

and some *conclusive* was because certain holders had better rights than others. The purpose of the distinction was not to facilitate rules of evidence, but rather to protect the interests of commercial parties, in particular the consignee's rights.

Chile disagreed with France that a consignee on a bill could not be the shipper or the carrier. However, France said the consignee must always be a moral person distinct from the shipper, otherwise, all actions would be brought in the name of the consignee.

Prof. Honnold noted that draft provision J-2 provided the sanction for failure to insert any of the notations required by the Convention; the condition of the goods and freight charges. The carrier did not depend on material furnished by the shipper for these. J-2 did not require the exact amount to be stated, but rather was designed to remove doubts when the Convention becomes part of national legislation.

Japan proposed the removal of any presumptions concerning freight charge because commercial practice was contrary. Freight collect was the rule and freight prepaid the exception.

Poland agreed with Japan, because normally a debtor must prove that he paid his debt. It was not the rule that a creditor must prove that it had been paid. These presumptions were a diabolical scheme against carriers.

France said Freight prepaid should be the presumption. J-2 would thus facilitate the negotiability of bills of lading.

Norway said the presumption as to good condition stressed the duty of the carrier to check the condition and disclose any defects, and would thus introduce international uniformity. Respecting a presumption of freight prepaid, however, a long tradition would be disturbed. He proposed that, instead, if the bill specify that freight was prepaid, nothing could be claimed from a *consignee* holding the bill in good faith; no benefit then for the shipper.

Norway then offered a Draft Proposal

"A Bill of Lading shall be *prima facie* evidence as against the carrier of the receipt by the carrier of the goods as therein described; however, proof to the contrary *by the carrier* shall not be admissible when the bill of lading has been transferred to third party, *including the consignee, who in good faith has acted in reliance on the description of the goods in the bill of lading*. The foregoing shall not apply to particulars in the bill of lading in respect of which and to the extent that the carrier has made reservation permitted under paras. 1 and 2 of this Article."

The United States said that commercial quotations on a C.I.F. basis nevertheless permitted the carrier to ship "Freight Collect" after deducting the amount of the freight from the invoice. Very often the

decision about shipping "Freight Collect" or "Prepaid" depended on the economic strength of the shipper and commercial practice left room for both methods. The provision on the condition of the goods conformed with the commercial practice. He again noted his preference for the optional treatment of the long list of 15 mandatory contents and noted that if the provision requiring a notation were to be merely optional, there would be no problem of a presumption that freight was prepaid. Because some systems of law permitted a lien for the carrier's unpaid freight charges against the cargo itself, it would be unwise to legislate extensively in this area in an international convention.

Chile felt that the presumption as to condition was not a sufficient sanction in the case of intentional or malicious failure to enter the various required particulars. For those cases there should be an additional sanction, such as no maximum limit of carrier liability. Argentina and Chile were dissatisfied with all existing proposals.

The USSR did not favor the presumption that freight has been paid in J-2. He could, however, support the Norwegian proposal which protected only third parties in good faith and not the shipper.

Belgium felt the freight presumption should be removed from the provision under discussion, or it should be confined to a statement as to whether freight was prepaid or not.

Singapore said it was essential *not* to impose on the holder a requirement to make enquiries on the question whether any freight charges were due because the carrier often had no agent at the port of discharge, and, in actuality, the presumption could be evaded easily by a printed notation that, "The carrier is entitled to collect freight from the consignee or other holder unless otherwise stated herein."

The Chairman then summarized the discussion and noted that by a majority of 9 to 6 the Plenary was opposed to a Presumption respecting Freight Prepaid.

At the Drafting Party Meeting the Chairman introduced alternative texts taken from suggestions offered by France and USSR.

#### *Alternative 1*

2. The bill of lading shall be *prima facie* evidence of the taking over or, where a shipped bill of lading is issued, loading by the carrier, of goods as described in the bill of lading.
3. However, proof to the contrary [by the carrier] shall not be admissible when the bill of lading has been transferred to a third party [including the consignee] who in good faith has acted in reliance on the description of the goods therein.
4. The provisions of paras 2 and 3 of this Article shall not apply to particulars in respect of which and to the extent that the carrier has

entered [in the bill of lading] reservation permitted under para.1 of this Article.

*Alternative 2*

2. Except for particulars in respect of which and to the extent that the carrier has entered reservation permitted under para.1 of this Article:
  - (a) the bill of lading shall be *prima facie* evidence of the taking over or, where a shipped bill of lading is issued, loading by the carrier of the goods as described in bill of lading; and
  - (b) proof to the contrary [by the carrier] shall not be admissible when the bill of lading has been transferred to a third party [including the consignee] who in good faith has acted in reliance on the description of the goods therein.

Subsequently these texts were extensively reworked by the Drafting Group which included it as Article 16 of the new draft convention.

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.
2. When the carrier fails to note on the bill of lading the apparent condition of the goods, including their packaging, he is deemed to have noted on the bill of lading that the goods, including their packaging, were in apparent good condition.
3. Except for particulars in respect of which and to the extent to which a reservation permitted under para.1 of this Article has been entered:
  - (a) the bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading by the carrier of the goods as described in the bill of lading; and
  - (b) proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

Thereafter, as a result of a general debate on the question of the evidentiary effect to be given a statement concerning the amount of freight, the following additional provision was added:

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be *prima facie* evidence that no freight is payable by the consignee. However,

proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

### 3. *Documents other than the bill of lading*

At the outset India indicated disapproval of any documents other than the bill of lading because this would discourage attempts to by-pass the new convention.

In reply it was noted that the provisions of the Convention would be applicable to all contracts for the carriage of goods by sea. The purpose of Draft Article A was to set forth the contents of a bill of lading, and not to affect that principle.<sup>205</sup>

Norway said the purpose of Draft Article A was to distinguish between a bill of lading and other documents evidencing carriage. India's question raised the important point of who would decide whether a bill of lading, a mere consignment note, or no document at all would be the method of reflecting the contract of carriage. Article 3(3) of the Hague rules, and Draft Alternative B, gave the right to the shipper to demand the issuance of a bill of lading, and in the second instance the right to demand issuance of a document other than a bill of lading—i.e., a consignment note.<sup>206</sup> Norway suggested that information fed into a data processing system should be treated in the same manner as information fed into a document.

Singapore noted that a common situation was for a consignor to take out a full set of shipping documents covering an entire bulk cargo. He would then sell portions of the cargo to several consignees, and issue to each a separate delivery note. In a recent case where the cargo had been damaged before the owner of the delivery note had become owner of the cargo, he had been denied a remedy from the consignor because the delivery note was not equivalent to the bill of lading, and denied a

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<sup>205</sup> *Draft Proposal A*

"Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of a statement required under Article ( ), shall be void and of no effect."

<sup>206</sup> *Draft Proposal B*

"Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of information required under Article ( ), shall be void and of no effect if the carrier knew [or should reasonably have known on the basis of facts apparent to him] that such a statement was incorrect or that the inclusion of such information was required."

remedy from the carrier because he had not been owner at the time of the injury. In view of this decision, care should be taken to insure that the definition adopted was wide enough to cover that type of situation.

The United States objected that the parties should *not* be required to use a bill of lading if *both* agree that it is not necessary. At the same time, one party should not be forced to use a particular type of document by the other party. The United States strongly supported the suggestion that information in automatic data processing systems be treated as informal documentation evidencing the contract of carriage.

India agreed that the parties should not be forced to use particular documents. However, producers are usually not familiar with transport documents, and normally a bill of lading would be the document issued.

Chile felt that the ideal solution, in terms of uniformity, would be that *the bill of lading should be the only transport document used*. However, a large part of marine transport used other documents, such as charter parties, therefore, the protections afforded by the Convention must apply to all such documents, or its provisions could be evaded. Chile favored Draft Proposal A, with the following addition:

"However the consignee or his successors will always have the right to make applicable to those other documents all the rights, presumptions and privileges that are given him with respect to the bill of lading and the contract of carriage in this Convention." Argentina supported Chile.

The United States said that in view of the proposed mandatory additions to the bill of lading, it would be a regressive step to require the same contents for other documents.

The C.M.I. agreed with the United States, adding that the carrier should not be in a position to avoid liability by refusing to issue a bill of lading. Alternative A would be acceptable.

The United Kingdom favored Draft Alternative A, but thought it unnecessary under the Common Law. Australia, Tanzania, and Nigeria also supported Draft Provision A.

Chile said that where the consignee needed a document of title, he should be given full protection. Since national legislation varied greatly, a common rule imposing certain obligations on the carrier was desirable.

France noted it would be useful to include a provision making transport documents, other than bills of lading issued by the carrier, evidence of the receipt of the goods by him. Draft Alternative A was acceptable, but without the unrealistic proposal of Chile. Once the carrier and shipper had concluded a contract of carriage, the consignee could not change it thereafter.

The I.N.S.A. preferred Draft Alternative A. Since the Chilean

proposal would enable the consignee to give all documents the same status as bills of lading it could not be accepted. Poland agreed and favored Draft Alternative A.

Norway supported Draft Alternative A and criticized the Chilean proposal as going too far. Some of the rules concerning bills of lading should not apply to non-negotiable documents, such as the rule on inadmissibility of contrary evidence where a bill of lading has been transferred to a good faith third party. The contents of other documents should be left to commercial practice. Under the Warsaw Convention, the airway bill was required to state only the place of departure and the destination. Norway then proposed an amendment to Draft Alternative A to the effect that the Convention applied to carriage of goods by sea in all instances, whether or not a negotiable instrument was issued, except in case of charter parties.

Chile again spoke on behalf of the proposal, arguing that it did not allow the consignee to change a contract of carriage. Rather, it merely stated the Working Group's intent to make the Convention applicable to all contracts of carriage. However, in view of criticisms, Draft Proposal A would be acceptable, and the Chilean proposal would be withdrawn.

It was noted that the rules on carrier liability were *not* subject to derogation. The only flexibility was with respect to the provisions on the contents to be included on a bill of lading.

Japan saw no need for documents other than bills of lading, but had no objection to Draft Alternative A, without the Chilean proposal. The U.S.S.R. supported this view.

Germany also favored Draft Proposal A, without the Chilean amendment. As to the contents of other documents, the parties should not have the right to declare the document negotiable so that a third party might acquire the document on the basis of its representing goods. Traders should not be misled into believing that a document was a bill of lading.

Argentina supported the Chilean Proposal as an attempt to prevent parties from escaping their responsibilities and avoid the scope of the Convention. Other documents should at least identify the goods, name the carrier who delivered them, and the person who was to receive them.

Norway proposed the following addition: (1) "However, the provisions contained in article (15) shall only apply when a bill of lading has been issued."

Belgium objected that the Norwegian amendment could only cause confusion, France concurred, favoring Draft proposal A without amendments.



Chile would now prefer to have no provisions whatsoever rather than draft provision A without clarifications.

India recognized the need for other documents, but felt they should contain at least some basic information and also state the carrier's responsibility. Anything less would amount to reopening the scope of the Convention, accordingly, India favored draft proposal B.

Germany felt the problem was not serious, because the consignee could always insist that the shipper demand the issuance of a bill of lading. It was probable that bills of lading would be issued most of the time. (It might be noted, however, that bills of lading are being phased out in North Atlantic trades.)

Norway then withdrew the Norwegian proposal. The chairman's summary recognized that a very large number of delegations had endorsed Draft Proposal A which became the basis for the text as approved.

*Article 18. Documents other than bills of lading*

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

*P. Letters of Guarantee (or Indemnification)*

This problem concerns the need to protect consignees from fraud perpetrated by the shipper in collusion with the carrier.<sup>207</sup> It is believed that the negotiability of bills of lading in general will be protected by the prevention of such collusion. The problem is created by the custom of banks which deal with documentary credits requiring that drafts be accompanied by, "a full set of clean, on-board bills of lading." Customarily, when goods are received by the carrier he can note the condition of the goods and their packing on the dock or mate's receipt and on the bill of lading itself. There is a serious risk that carriers might protect themselves by notations of defects on *all* receipts. However, such practice is not widespread because it could become a competitive factor. Article 16 of the "*Uniform Customs and Practice for Documentary Credits*, (1962) and the 1974 Revision" sum up the existing jurisprudence to the effect that a "clean" shipping document bears no superimposed

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<sup>207</sup> Pomerene Bills of Lading Act 49 U.S.C. 121 (1970) "Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading . . . or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter . . . shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years . . ."

clause or notation which expressly declares a defective condition of the goods and/or the packaging. Banks may refuse shipping documents bearing such clauses or notations unless the letter of credit expressly states clauses or notations which may be accepted.<sup>208</sup>

Norway noted that the purpose of Draft Provision K was to make the shipper responsible for incorrect information supplied by him and included on the bill of lading (prepared by the shipper).<sup>209</sup> In practice the carrier will carry the goods and the shipper will give to the carrier a letter of guarantee, holding the carrier harmless in a legal action brought by the consignee. Thus, the carrier has two bases of liability to use against the shipper. Under Draft Provision B, a carrier could not invoke a letter of guarantee when the carrier knew that the shipper's statements were inaccurate. Under Draft K, however, the carrier could still sue under the contract. This inconsistency was not advisable, and Draft Provisions K and B must be harmonized.

France said that a decision should first be reached on Draft K. Under French law, the letter of guarantee remained valid only as between shipper and carrier. It was invalid with respect to third parties. This should be the model.

Poland felt that the provisions B and K were not that closely linked. All the letter of guarantee accomplished was to confirm the implied guarantees in Draft Provision K.

France said the Hague Rules did not specify how far the guarantee went. A shipper could argue that the guarantee ended upon transfer to a

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<sup>208</sup> In this country the bill of lading is considered clean if the notation is a mere disclaimer of carrier liability for some conditions not listed in the printed bill of lading. See *Liberty National Bank v. Bank of America* 218 F.2d 831 (10th Cir., 1955). (The fact that the disclaimer notation keeps the bill of lading clean does not affect the possible invalidity of the notation under COGSA 1303 (8); H.R. III (8).) However, if the notation is descriptive of specific defects the bill is considered "foul" so that the bank would be entitled to dishonor the draft for non-compliance with the terms of the credit. It is in these circumstances that the shipper may ask the carrier to issue a clean bill so as to expedite the documentary credit. In this country, if the carrier does issue a clean bill of lading under a letter of guarantee or indemnity from the shipper, the carrier will be estopped to deny the bad packing or bad condition of the goods upon suit by the consignee. See *Molinilli Giannusa & Rao v. Navigazione Libera Triestina*, 53 F.2d 374 (2d Cir., 1931) and *Continex Inc. v. S.S. Flying Independent* 106 F.Supp. 319 (S.D.N.Y., 1952). The desirable goal is protection of the consignee from fraud, and it is doubted whether international legislation is necessary to achieve that goal.

<sup>209</sup> Draft proposal K is found at fn. 203 (supra.). Draft proposal A is found at fn. 205 (supra). Draft proposal B is found at fn. 206 (supra.).

#### *Draft Proposal C*

"When the carrier knowingly states inaccurate information in the bill of lading or omits any information required to be included under Article ( ) he shall be responsible to the consignee or other third party to whom the bill of lading has been transferred, for any loss, damage or expense incurred in good faith by such third person as a result of such statement or omission without the benefit of the limitation on carrier liability provided for in this Convention."

third party. Draft Proposal K gave the carrier the legal certainty that the shipper's obligation continued after transfer of the bill of lading.

The United States said K was acceptable since it did clear up an ambiguity. Thereafter, Argentina, Japan, Singapore, U.S.S.R., Chile and Tanzania approved Draft Proposal K.

Accordingly, *Proposal K was considered adopted*, Norway reserving its position as to a future combination of K & B, and the debate returned to a consideration of Draft Proposals A, B, and C.

France argued that Draft Proposal "A" was much too radical. It purported to render null and void all letters of guarantee. Draft Proposal B was unacceptable also as impractical, since the letter would be void only if the carrier knew of the inaccuracy of the statement made in the bill of lading, thus introducing a difficult question of proof and uncertainty as to the validity of the letter. This criticism also applied to Draft C. It required that the carrier "knowingly" stated incorrect information or omitted any required information. French law was the best solution. The letter remained valid between shipper and carrier, but could not be invoked against a third party. A proposal to this effect was made from French law in conformity with the principle that an agreement between two parties could not injure the rights of third parties, as follows:

Text of article 20 of the Act of 18 June 1966:

Any letter or agreement by which the shipper undertakes to indemnify the carrier where the latter or his representative has consented to issue a bill of lading containing no qualifications shall be null and void as against third parties, who may, however, rely on the letter or agreement as against the shipper.

Where a qualification has been intentionally omitted and relates to a defect in the goods of which the carrier knew or should have known when signing the bill of lading, he may not rely on that defect to avoid his liability and shall not benefit from the limitation of liability provided for in article 28 below.

Proposed variant by France to combine the paragraphs:

Any letter or agreement by which the shipper undertakes to indemnify the carrier where the latter or his representative has consented to issue a bill of lading containing *incorrect statements or omitting any information required to be included* under [Article 15] shall be null and void as against the consignee or any third party to whom the bill of lading is transferred, but shall render the shipper liable to any such person for any loss, damage or expense resulting from the statements or omissions.

Japan argued that the entire subject of letters of guarantee should be left out of the Convention, since the letter had effect only between the

carrier and the shipper and not against third parties. The letter benefited only the shippers, allowing them to obtain a clean bill of lading for letter of credit purposes. If the subject had to be regulated in the Convention, then the French proposal was acceptable, but it was better to omit it.

Argentina said the French proposal was acceptable, however, it should be made clear that unit limitation of liability did not apply where certain facts were concealed by agreement between the carrier and the shipper. France agreed with Argentina, and added a sentence to that effect, at which point Japan said that with that addition the French proposal was no longer acceptable.

Chile said that the French proposal was acceptable, except that the concept of carrier knowledge should be eliminated. If the carrier consented to issue a clean bill of lading against a letter of guarantee, *he must be presumed to know of some defect*. A requirement of good faith dealing would cover the case where the shipper and consignee were legally the same person.

Germany stressed that the economic importance of the letter of guarantee should be recognized. In most judicial tests of its validity, the decisive test was the existence of fraud on consignees, however, Germany was inclined to the view that the convention should remain silent on the subject, due to wide differences between various legal systems on questions of fraud.

The U.S.S.R. supported the position of Japan. The whole subject could be left out of the convention since commercial practice appeared to be satisfactory. If the subject must be included in the convention, the rule should be flexible, thus the French proposal could be used as the basis of discussions. As to the relation to the unit limitation of liability, the draft convention already covered that because a carrier issuing a clean bill of lading in bad faith would lose the unit limitation due to wilful misconduct.

Nigeria favored Draft Proposal A. Such letters should never be valid under any circumstances. Draft Proposal B, because of the difficulty of establishing lack of knowledge, could not be supported. If compromise were necessary the French Proposal could be used as the basis.

Norway argued that any draft provision should be an overall solution based on K, B and C. The French proposal did not solve the problems involved. The entire subject matter must be regulated in the new convention, however, because it was inadvisable for the new convention to enter into the area of sales law (the relationship between the shipper and the third party buyer) the only relevant relationships were those between the carrier and the third party, and between the carrier and the shipper and this convention should regulate those relationships. Draft B

was preferable to A because, in a bona fide dispute, the letter would be a useful method of dispute settlement. Invalidation of the letter would hurt only the seller, because the carrier would have made reservations in the bill of lading. India agreed with Norway that the subject must be in the Convention. The letter of guarantee could be accepted if the rights of third parties were safeguarded.

The observer from The International Chamber of Shipping said that letters of guarantee were generally issued when there was a genuine dispute between carrier and shipper. There seldom was a conspiracy. Instead, there was usually shipper pressure and carrier resistance especially as to *date of shipment*. It must also be noted that the carrier would forfeit his P & I coverage by conspiring with the shipper. Draft provision A goes much too far. Draft B would produce considerable litigation since it was too unclear. Accordingly he supported the view of the United States and Japan that the entire subject should be omitted.

The United States said that an overall solution was impossible, although the French proposal would provide a basis for the Drafting Party if the Plenary believed the subject should be in the convention. At the root of the problem the banks wanted flexibility, not exact rules, respecting tenders of documentary credits, and this Convention could have no control over them. Draft "A" could not be supported because letters were useful in bona fide disputes between carrier and shipper. The relationship between shipper and carrier should be left to national legislation.

Once letters of guarantee were permitted the problem is the danger of fraud on the consignee by collusion of shipper and carrier. National law might provide that in order to discourage fraud there would be no right of contribution between joint tortfeasors (shipper and carrier) and that this would remove the temptation for carrier assistance in shipper frauds because the carrier would be the one sued in case the shipper could not be made subject to the jurisdiction of the courts in the consignee's country. National law might also provide that the defrauder is liable, without the possibility of limitation of liability, for deceit which would carry with it the right to expanded consequential damages (such as economic loss) and punitive damages. Because of uncertainty as to the carrier's rights to unit limitation, an American consignee would probably not seek to use the maritime law or the Admiralty forum but instead would assert his rights under the common law in the state courts, although he would not be able to use the "In Rem" process to seize the offending vessel. With respect to discouraging fraud and protecting consignees, the optimum provision from the American viewpoint would be the Maritime action against the

carrier (using "In Rem" Process) which would follow the measure of damages rules of the common law for consequential and punitive damages.

When it comes to the problem of the rights between the two tortfeasors, the carrier and the shipper, the question should not be included in the Convention but should be left to national law, preferably so that the carrier would have no right to enforce contribution from the shipper where both have acted fraudulently towards the consignee. It was with respect to the carrier-shipper relation that a question of constitutional law and states' rights would be raised in the United States.<sup>210</sup> It could be maintained that the action by carrier against shipper was not a traditional maritime action, although it might also be argued that such a claim could easily be made "pendent" to claims of the carrier arising under maritime law. The proposed symmetrical treatment of the entire subject in the convention could also result in an inequity because the consignee's action against the carrier would be subject to unit limitation of liability whereas the carrier's action against the shipper would not be so limited. Although federal states often used constitutional arguments as a shield to ward off unpleasant subjects in international discussions, it might be that this constitutional problem, although minor, had some relevance now because it was not really necessary to include the recourse action by the carrier except for reasons of symmetrical treatment. Finally, the United States argued that the subject of letters of guarantee had not been in the 1924 Convention and need not be introduced at this point.

There seemed to be three possible approaches now: approve all letters of guarantee; approve no letters of guarantee; and approve some letters of guarantee. The first alternative was out of the question because letters of guarantee could be used in fraudulent schemes. The second alternative was also out of the question because commercial practice demands the use of such letters in legitimate disputes. If we are to approve some letters and disapprove others, then we are set on a course

<sup>210</sup> Under the maritime law the consignee will have an action against the carrier for lost or damaged goods in accordance with COGSA. See *Dempsey & Assoc. v. S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); and *Cummins Sales & Service Inc. v. Institute of London Underwriters*, 476 F.2d 498 (5th Cir., 1973). Further, the consignee has a civil action (not in Admiralty) against the carrier for fraud. See *The Carso*, 53 F.2d 374 (2nd Cir. 1931); *Luckenbach S.S. Co. v. Gano Moore & Co.*, 298 F.343 (S.D.N.Y. 1934); *Toko Bussan Kaisha Ltd. v. American President Lines*, 155 F.Supp. 886 (S.D.N.Y. 1957), affirmed 265 F.2d 418 (2nd Cir. 1959); *Freedman v. Norddeutscher Lloyd* 22 Misc. 2d 397, 199 N.Y.S.2d 709 (Sup. Ct. N.Y. Cty. 1960).

The consignee's action against the shipper would also be a civil action for intentional fraud. Unfortunately there is no case law directly on point, but this would be the consequence of dicta in *Luckenbach S.S. Co. v. Gano Moore & Co.* 298 F. 343 (S.D.N.Y. 1923).

where complete legislation into all relationships and not the partial regulation by Draft Proposal B was necessary. Therefore, the only sensible suggestion seemed to be the omission of the subject of letters of guarantee from the new convention, as stated by Japan and U.S.S.R.

The United Kingdom agreed with the United States that neither Draft Proposal A or B or C was acceptable. Draft Proposal B had a hidden danger in the carrier knowledge provision which would kill letters of guarantee.

Tanzania said that the French proposal furnished a useful basis for drafting. International trade would not be hindered by such a proposal, and it was important that consignees' rights be safeguarded as much as possible, which the French proposal would accomplish.

The I.U.M.I. observer said that Marine insurers rarely saw a letter, but those they did see were generally in fraudulent situations. Marine insurers had been unwilling to render insurance null and void when a letter was issued. It was likely that as the trend towards unitization of cargoes progressed, the use of honest letters would increase. The convention should deal with the subject, because the rules for prima facie proof gave opportunities for fraudulent letters of guarantee. The situation required uniform international treatment.

Argentina argued that there was a need to clarify the position of the consignee, which varied in different national legislations. Norway apparently regarded the consignee as a third party to the maritime transaction, while in Latin America he was a party to the contract of carriage.

Norway noted that it was important to draw a distinction between parties to a letter of guarantee and parties to a contract of carriage. It was at this point that Norway introduced a new draft proposal combining Draft Proposals B, C and K, as follows:

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the *nature of the goods, their marks, number, quantity and weight*, as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such *particulars*. The shipper shall remain *liable* even if the bill of lading has been transferred to a third party. The right of the carrier to such indemnity shall in no way limit his *liability* under the contract of carriage to any other person than the shipper.
2. *Where the carrier has intentionally omitted to enter reservations in the bill of lading with respect to particulars furnished by the shipper on the apparent condition of the goods, including their packaging, and the carrier knows that the description of the goods as a conse-*

*quence thereof will be misleading for any third party holder of the bill of lading*

- (a) any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to such omission shall be void and of no effect;
- (b) *The carrier shall have no right to indemnity from the shipper pursuant to paragraph 1 of this Article;*
- (c) the carrier shall be liable for any loss, damage or expense incurred by any third party holder of the bill of lading who has acted in reliance on the description of the goods in the bill of lading, without the benefit of the limitation of liability provided for in this Convention.

Norway argued that his draft was a compromise between the French view in favor of the status quo on letters of guarantee and the view of those who would eliminate letters of guarantee completely.

The Norwegian proposal was quickly supported by Singapore and Australia while France reiterated its position, stating that the Norwegian proposal would attempt the impossible—validating the letter of guarantee as between carrier and shipper and invalidating it as between carrier and third parties.

The Chairman indicated that the French Proposal probably had the support of 5 states for a first choice and 4 more for a second choice, but that this was not a clear direction to the Drafting Party.

The chairman then said four questions had to be decided:

- 1—Are letters of guarantee invalid against third parties acting in good faith, including the consignee? The vote was 11 yes; 1 no; 2 abstentions.
- 2—Are letters of guarantee invalid as between carrier and shipper? (a) in all cases? The vote was 0 yes; 16 no; 2 abstentions. (b) in some cases? The vote was 9 yes; 6 no; 2 abstentions.
- 3—Should there be a provision on the liability of the carrier to third parties, including the consignee? The vote was 11 yes; 2 no; 4 abstentions.
- 4—Should there be a provision making the shipper liable to third parties, including the consignee? The vote was 3 yes; 7 no; 6 abstentions.

During a long debate before the Drafting Party the Norwegian proposal gained additional support so that the end result did not resemble the French Proposal which had once appeared to have majority support, but came to resemble the Norwegian proposal.

At the Second Reading the United States, supported by C.M.I., I.C.S. and I.C.C., proposed again to eliminate the provision completely. There was an extensive debate, but there was not enough support among the



voting delegations so that the provisions were incorporated in the draft text as Article 17:

*Article 17. Guarantees by the shipper*

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued.\*

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\* In regard to drafting changes that may be necessary, see section B, footnote 17, of the Report of the Working Group on International Legislation on Shipping on the work of its eighth session, 10 to 21 February 1975 (A/CN.9/105). The United States position continues to oppose Article 17, especially paragraphs 3 and 4.